FILED
981282 FEB 10 1999
OFFICE OF THE CLERK

No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANKS & SON, INC., on behalf of themselves and all others similarly situated

Petitioners,

v.

THE STATE OF WASHINGTON, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, AND OFFICE OF THE STATE TREASURER

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

PETITION FOR A WRIT OF CERTIORARI

JAMES H. HANSON
LYNNE D. LIDKE
ROBERT L. BROWNING
Scopelitis, Garvin, Light & Hanson, P.C.
10 West Market St.
Suite 1500
Indianapolis, IN 46204
(317) 637-1777

ANDREW L. FREY*
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

95pp

QUESTION PRESENTED

Whether the Commerce Clause requirement that state taxes be fairly apportioned is inapplicable to "regulatory fees," *i.e.*, state exactions that are used to pay for regulatory activity.

RULE 29.6 STATEMENT

Petitioner Franks & Son, Inc., has no parent corporation and no nonwholly-owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(I)
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT	1
REASONS FOR GRANTING THE PETITION	6
A. The Decision Below Cannot Be Reconciled With This Court's Precedents	7
B. The Lower Courts Have Taken Conflicting Approaches To the Commerce Clause Apportionment Requirement	19
C. The Question Presented Here Is An Important And Recurring One	24
CONCLUSION	29

TABLE OF AUTHORITIES

Pages

Cases

American Trucking Ass'ns v. *Conway*, 566 A.2d 1335 (Vt. 1989) 12,23,27

American Trucking Ass'ns v. *Goldstein*, 541 A.2d 955 (Md. 1988) 12,23,27

American Trucking Ass'ns, Inc. v. *Scheiner*, 483 U.S. 266 (1987) . . . . . *passim*

American Trucking Ass'ns v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993) . . . . . *passim*

American Trucking Ass'ns, Inc. v. *Secretary of State*, 595 A.2d 1014 (Me. 1991) . . . 13,21,22,27

American Trucking Ass'ns, Inc. v. *State*, 556 N.W.2d 761 (Wis. Ct. App.) rev. denied, 560 N.W.2d 274 (Wis. 1996) . . . 23,27

American Trucking Ass'ns, Inc. v. *State of New Jersey*, No. A-0006334-97T3F (N.J. Super. Ct. App. Div.) 27

Armco Inc. v. *Hardesty*, 467 U.S. 638 (1984) . . 7,8,10

Black Beauty Trucking, Inc. v. *Indiana Dept. of State Revenue*, 527 N.E.2d 1163 (Ind. Tax 1988) 12,23

Boston Stock Exchange v. *State Tax Comm'n*, 429 U.S. 318 (1977) 8

Capitol Greyhound Lines v. *Brice*, 339 U.S. 542 (1950) 12

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 7,14,16,24

Covell v. *City of Seattle*, 905 P.2d 324 (Wash. 1995) 17

TABLE OF AUTHORITIES — Continued

Pages

Dept. of Banking & Finance v. *Credicorp, Inc.*, 684 So.2d 746 (Fla. 1996) 24

Evansville-Vanderburgh Airport Auth. Dist. v. *Delta Airlines*, 405 U.S. 707 (1972) 9

Freeman v. *Hewitt*, 329 U.S. 249 (1946) 14

Government Suppliers Consolidating Servs., Inc. v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1993) 22

Interstate Towing Ass'n v. *Cincinnati*, 6 F.3d 1154 (6th Cir. 1993) 23

James B. Beam Distilling Co. v. *Georgia*, 501 U.S. 529 (1991) 28

Kentucky v. *American Trucking Ass'ns*, 746 S.W.2d 65 (Ky. 1988) 23

McKesson Corp. v. *Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) 28

National Cable Television Ass'n v. *United States*, 415 U.S. 336 (1974) 17

Oklahoma Tax Comm'n v. *Jefferson Lines, Inc.*, 514 U.S. 175 (1995) 1,7,8,14

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 5,14,23,24

Trailer Marine Transport Corp. v. *Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992) 22

Tyler Pipe Industries, Inc. v. *Washington State Dept. of Revenue*, 483 U.S. 232 (1987) 8,11

Union Pac. R. Co. v. *Public Utility Comm'n*, 899 F.2d 854 (9th Cir. 1990) 17

TABLE OF AUTHORITIES — Continued

Pages

V-1 Oil Co. v. *Utah State Dept. of Public Safety*, 131 F.3d 1415 (10th Cir. 1997) 23

Constitutional Provisions:

U.S. Const., Art, I, § 8, cl. 3 15

Statutes and Regulations:

28 U.S.C. § 1257 1

31 U.S.C. § 483a, revised and recodified at 31 U.S.C. § 5701 17

49 U.S.C. § 11503(b) 17

Cal. Vehicle Code §2502(c) 24

Col. Rev. Stat. Ann. § 42-20-202(b) 25

Col. Rev. Stat. Ann. § 42-20-202(5) § 42-20-107 26

Conn. Gen. Stat. Ann. § 16a-106(c) 26

Conn. Gen. Stat. Ann. § 22a-454 25

7 Del. Code Ann. § 6006(5) 26

Code Del. Reg. § 10-400-007 24

Ga. Code § 46-11-4 (i) 25

Iowa Code Ann. § 455B.424(5)(c) 25

Kan. Stat. Ann. § 65-3431(u) 26

Kan. Ad. Reg. § 28-31-10(f) 25

Md. Code Ann. § 7-252(a)(2), (b)(2)(ii) 25

TABLE OF AUTHORITIES — Continued

Pages

Mich. C.L.A. § 29.473(b)(3) 25

Mich. C.L.A. § 29.475(4) 26

Minn. Stat. Ann. § 221.0355(4)(b) 25

Nev. Rev. Stat. § 459.9805(1)(b), (d) 25

N.J. Stat. Ann. §§ 7:26G-3.3(g) 25

N.J. Stat. Ann. §13:1E-18 26

N.J.R. 1995(a), 1996 (Aug. 15, 1988) 26

N.J.R. 1693 (Apr. 1, 1996) 25

N.M. Stat. Ann. § 74-4F-3(C) 25

N.Y. ECL § 72-0201 (11) 25,26

N.C. Gen. Stat. § 130A-294.1(b) 26

N.C. Gen. Stat. § 130A-294.1(j) 25

Ohio Rev. Code §4905.80(C)(1)(a) 25

Tenn. Code Ann. § 68-212-203(a)(6)(C) 25

Tex. Natural Resources Code § 113.131k (d)(1) 26

Tex. Natural Resources Code § 116.072(c)(1) 26

Wy. Stat. § 37-14-103 26

Miscellaneous

HELLERSTEIN, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138 (1988) 10,11

TABLE OF AUTHORITIES — Continued

Pages

Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253 1940) 15

Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 1986) 9

PETITION FOR A WRIT OF CERTIORARI

Petitioner Franks & Son, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Washington Supreme Court in this case.

OPINIONS BELOW

The opinion of the Washington Supreme Court (App. *infra*, 1a-31a) is reported at 136 Wash. 737, 966 P.2d 1232. The opinions of the trial court (App., *infra*, 32a-58a) are unreported.

JURISDICTION

The judgment of the Washington Supreme Court was entered on November 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

STATEMENT

The decision below injects an illogical and dangerous loophole into the limitations imposed by the Commerce Clause upon state taxing authority. This Court has held that state taxes on interstate commerce must be fairly apportioned among taxing jurisdictions, thus ensuring that no State "take[s] more than its fair share of taxes from [an] interstate transaction." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). But the Washington Supreme Court held in this case that the apportionment requirement does *not* apply so long as the revenues collected under a given tax are used to pay the costs associated with state regulatory activity. That decision plainly departs from this Court's holdings, permits the imposition of cumulative

burdens on interstate commerce, contributes to a growing disarray in the lower courts, and sows considerable confusion in an already complex area of the law. Further review therefore is warranted.

1. At the time of the events giving rise to this action, the State of Washington imposed a flat annual fee (the "Washington tax"[1]) on trucks that traveled the State's highways. Washington Laws of 1971, 1st Ex. Sess., ch. 143, § 5, previously codified at RCW 81.80.320. The Washington tax required payment of a flat fee by every truck that entered the State, in amounts that varied according to the weight of the truck but not the miles driven on Washington highways; the tax ranged from $7 for vehicles weighing less than 4,000 pounds to $48 dollars for trucks weighing 72,000 pounds or more. See App., *infra*, 2a.[2] The tax regime made it unlawful for any carrier to operate a vehicle in Washington without payment of the fee. See *id.* at 3a. The revenue from the tax was used to fund the State's "motor carrier safety enforcement program" (*ibid.*), paying for what the court below described as "safety programs and inspections related to trucks on Washington's roads." *Id.* at 18a.

Petitioner brought this suit in Washington state court as a class action on behalf of all interstate motor carriers whose vehicles travel in and through Washington, contending that

---

[1] We variously refer to the Washington levy as a "tax" or a "fee" because, for reasons explained below, we do not regard the nomenclature as bearing on its constitutionality.

[2] As an alternative to the flat tax, the Washington regime allowed carriers to purchase "single trip permits"; it also provided for "floater cards," which carriers could transfer among vehicles as they were sent into the State. App., *infra*, 3a-4a (citing former RCW 81.80.300; RCW 81.80.318). In addition, all vehicles were required to pay a federally authorized "identification fee" that never exceeded $10. *Ibid.*

the Washington tax is inconsistent with the Commerce Clause of the United States Constitution. See App., *infra*, 4a.[3] Petitioner contended that the Washington tax discriminated against interstate commerce and was invalid under the doctrine of cases like *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), which held that flat taxes on trucks traveling interstate do not satisfy the Commerce Clause requirement of fair tax apportionment; the State responded that *Scheiner* was inapplicable because the Washington levy was a "regulatory fee" and not a "tax."

The trial court agreed with petitioner that the Washington tax was unconstitutional. In its view, "any regulation involving imposition of a tax-like fee is subject to the same scrutiny under the Commerce Clause as taxes are." App., *infra*, 51-52a. The court explained: "[t]he regulatory fee is exacted for the privilege of entering and using highways in Washington, much like fees charged users for highway maintenance in *American Trucking Assn. v. Scheiner*, *supra*. * * * [T]he safety inspection program should not be analyzed differently because it arises from the state's police power rather than the state's taxing authority." *Id.* at 42a-43a. The court added that "[a]ll states could duplicate this fee on interstate carriers because the safety issues within their boundaries are similarly implicated. Accordingly, there is a potential for multiple burdens [on interstate trucks]." *Id.* at 43a.[4] Nevertheless, although holding the tax unconstitutional,

---

[3] Although the tax was repealed effective January 1, 1994, the suit continued because petitioner sought refunds of fees paid since March 1987. App., *infra*, 7a.

[4] Having held that the tax was not properly apportioned, the court never decided whether the levy also discriminated impermissibly against interstate commerce. Even assuming that interstate carriers effectively paid more per-mile than did intrastate carriers under the flat tax, the court noted the State's contention that interstate carriers impose burdens on the State that differ from those imposed by

the court denied refund relief by giving its decision purely prospective effect. *Id.* at 32a-39a.

2. After both parties appealed (the State challenging the finding of unconstitutionality and petitioners contesting the denial of a refund), the Washington Supreme Court reversed the trial court's ruling on the merits of the Commerce Clause issue, holding the Washington tax constitutional. App., *infra*, 1a-31a. The state supreme court acknowledged that "[i]f the regulatory fee were a tax, * * *, then the question in this case would be whether the tax was properly apportioned." *Id.* at 13a. But the court declined to ask (let alone answer) that question, accepting the State's argument that "a *regulatory fee* is different from a *tax*." *Id.* at 10a (emphasis in original). The court explained that a fee must be regarded as "regulatory" if the revenues it raises "are used exclusively for purposes of financing regulation" (*id.* at 11a), reasoning that regulatory fees are subject to lesser scrutiny than are general revenue taxes because "[t]he burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations." *Id.* at 11a (citations and internal quotation marks omitted). The court therefore concluded that a "regulatory fee [is] not a tax subject to the apportionment requirement" (*id.* at 15a) and that "the stringent standard for appraising tax measures does not apply where the statute at issue qualifies as a regulatory measure." *Id.* at 16a.

---

intrastate carriers. The court found that, at the summary judgment stage, "[t]hese factual claims [were] not refuted by Plaintiffs." App., *infra*, 42a. The court therefore concluded that "Plaintiffs' concerns for disparity of costs per mile to interstate and intrastate carriers does not mean that this regulatory fee discriminates against interstate commerce." *Ibid.* Because the court granted petitioner summary judgment on apportionment grounds, there was no need for it to revisit the question of discrimination.

Turning specifically to the Washington tax at issue, the court opined that "[w]hether an exaction is a tax or a fee depends on whether its purpose is to raise revenue or to regulate an industry or services." App., *infra*, 12a. To make this determination, the court applied a three-part state-law test that inquired "whether the primary purpose of the monetary assessment is to accomplish desired public benefits which cost money, or to regulate an industry or activity" (*ibid.*); "whether the money collected must be allocated only to the authorized regulatory purpose" (*ibid.*); and "whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer." *Id.* at 13a. Under this test, the court held that the Washington levy "imposed a regulatory fee, not a flat tax." *Ibid.* The court therefore turned to the balancing test announced in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), to determine the constitutionality of state *regulations* under the Commerce Clause, and concluded that the Washington tax passed this test. App., *infra*, 16a-20a.[5]

Justices Sanders and Alexander dissented. App., *infra*, 24a-31a. Finding that the Washington tax "cannot be distinguished from the one held unconstitutional in *Scheiner*" (*id.* at 30a), Justice Sanders explained that "[w]hether we characterize this charge as a 'tax' or a 'regulatory fee' doesn't matter in and of itself — only whether its measure places a heavier burden on interstate than intrastate activities, *Scheiner*, 483 U.S. at 281-82, thus granting a competitive advantage to local truckers at the expense of their interstate competitors." *Id.* at 24a. He therefore "disagree[d] with the majority that a regulatory fee on the privilege to use the roads of a state need not be apportioned to survive constitutional

---

[5] The court also rejected petitioners' contention that the Washington tax was preempted by federal law. App., *infra*, 20a - 23a. That issue is not presented here.

scrutiny, at least when that fee is not based on the consumption of state resources by the actual payer of the fee." *Id.* at 27a. Noting that the collection of flat fees by all the States would lead to the imposition of multiple taxes on interstate vehicles but only a single tax on intrastate carriers, he concluded that "[s]uch result discriminatorily burdens interstate commerce whether we call it a regulatory fee, a tax, or some other name" — and that "[t]his conclusion necessarily holds true no matter how each of the states spends the resulting revenue." *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

This case presents a recurring issue of great practical importance: whether States may evade the basic Commerce Clause requirement of fair tax apportionment by the simple expedient of earmarking the revenue from an otherwise unconstitutional tax to pay the costs associated with regulatory activity. The decision below, which approved such unapportioned flat taxes, should not stand. That decision cannot be reconciled with *Scheiner* and others of this Court's precedents; contributes to a growing disarray in the lower courts about the meaning of the controlling Commerce Clause principles; encourages States in their continuing attempts to circumvent the clear apportionment rules announced by this Court; and reads a wholly illogical and unadministrable distinction into the law. In addition, notwithstanding the repeal of the Washington tax, the legal question presented here remains one of considerable significance in jurisdictions across the Nation. Review of the decision below accordingly is imperative.

A. The Decision Below Cannot Be Reconciled With This Court's Precedents

1. At the outset, there can be no doubt that the decision below is flatly inconsistent with this Court's precedents — and offers other courts and state taxing authorities a roadmap for evading Commerce Clause requirements. A fundamental

purpose of the Clause is to preclude States from "'tax[ing] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 280 (1987) (quoting *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984)). The Court has given force to this requirement by holding that a state tax will be deemed unconstitutional unless it satisfies *each* of the four parts of the familiar test first articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), *i.e.*, unless it "'[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Jefferson Lines*, 514 U.S. at 183 (quoting *Complete Auto*, 430 U.S. at 279).

Satisfaction of the essential second prong of this test, that of fair apportionment of taxes between the States, is in turn determined by application of the so-called "internal consistency" test. As the Court has explained,

> *any* threat of malapportionment [is assessed] by asking whether the tax is "internally consistent" * * * . Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. *A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction*, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

Jefferson Lines, 514 U.S. at 185 (emphasis added). See also *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 247 (1987); *Armco*, 467 U.S. at 644-646. *All* taxes therefore must be judged for internal consistency, with failure of the internal consistency test establishing unconstitutionality of the tax as a matter of law. And flat taxes such as Washington's necessarily fail the test.

The Court's decision in *Scheiner*, which applied the internal consistency test to invalidate flat highway taxes that were identical in their essential elements to the levy challenged here, explains why this is so. *Scheiner* involved a challenge to two flat taxes — a "marker fee" and an "axle tax" — imposed by Pennsylvania on both interstate and intrastate truckers. See 483 U.S. at 273-275. In holding the taxes unconstitutional, the Court explained that the Commerce Clause "'by its own force created an area of trade free from interference by the States'" (*id.* at 280, quoting *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977)), and then concluded that

> [t]he unapportioned flat taxes * * * penalize some travel within the free trade area. Whether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. To pass the "internal consistency" test, a state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Armco Inc.* v. *Hardesty*, 467 U.S., at 644. If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Id. at 284.

The reason is obvious: unapportioned levies necessarily impose cumulative burdens on interstate commerce that are

not borne by equivalent intrastate activity. Imagine, for example, a flat tax of $48 — like the one set by Washington in this case — that is imposed on all heavy trucks that use a State's roads. If identical taxes were imposed by the 48 contiguous States, an interstate truck that traveled across the country would pay annual fees of as much as $2304; an identical truck that confined its business to one State but traveled the same number of miles would pay only $48. As a consequence, it is inevitable that flat taxes are malapportioned because they "'bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical * * * that sells in only one place.'" *Id.* at 285 n.20 (quoting Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1188 (1986)).[6]

With this principle in mind, one of the leading commentators in this area — and one cited as authoritative by the court below (see App., *infra*, 16a) — has explained that

> the imposition of *any* unapportioned flat state or local tax on a multistate business would appear to be vulnerable to attack under the "internal consistency" doctrine. * * * This conclusion follows inexorably from a simple

---

[6] In this respect, flat taxes like the ones at issue here and in *Scheiner* are quite different from per-use fees like highway tolls. The latter type of fee is neither malapportioned nor discriminatory because it is calibrated to charge every user for each use of a particular service provided to the taxpayer (or to compensate the State for every expense imposed upon the State by the taxpayer). In the highway toll example, the traveler who takes ten trips on the highway will pay the toll ten times, while the traveler who passes through once will pay only a single toll; in-state travelers have no special advantage because the fee "'is based on some fair approximation of use or privilege for use.'" *Scheiner*, 483 U.S. at 289 (quoting *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines*, 405 U.S. 707, 716-717 (1972)).

> application of the "internal consistency" principle. If every state were to impose an unapportioned flat tax on business activities in which both intrastate and interstate enterprises engage, the interstate business would pay the tax in each state in which it did business, whereas its intrastate competitor would pay but a single tax in the state in which it did business. Because the tax is not apportioned to the activity carried on in the state, the interstate enterprise would bear a heavier tax burden than its intrastate competitor merely because it was engaged in interstate commerce — a paradigmatic "impermissible interference with free trade."

Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 153-154 (1988) (quoting *Armco*, 467 U.S. at 644) (emphasis in original; footnote omitted).[7] See also *Scheiner*, 483 U.S. at 303-304 (Scalia J.,

---

[7] The Washington court noted that Professor Hellerstein, writing shortly after the decision in *Scheiner*, had observed that some pre-*Scheiner* courts distinguished between general revenue taxes and user fees, posing the question whether the distinction between fees imposed for regulatory purposes and general revenue taxes "'is a distinction that makes a constitutional difference insofar as the commerce clause (and "internal consistency") analysis is concerned.'" App., *infra*, 16a (quoting Hellerstein, *supra*, 87 MICH. L. REV. at 156). Significantly, however, the court omitted his answer to that question:

> there is no reason to believe that a regulatory license fee would be immune from the "internal consistency" requirement merely because it constituted an exercise of the state's regulatory power rather than an exercise of the state's taxing power. *Surely the evils that the "internal consistency" test are designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power. In each case, the licensee carrying on his trade in more than one*

dissenting) (the internal consistency principle as stated by the Court requires the invalidation of "any unapportioned flat tax on multistate activities"); *Tyler Pipe*, 483 U.S. at 254 (Scalia, J., dissenting) (same).

Indeed, it follows from the structure of a flat tax that such a levy not only is malapportioned, but also invariably discriminates against interstate commerce. "[T]he very nature of the market that interstate operators serve prevents them from making full use of the privilege * * * for which they have paid the State" a flat fee. *Scheiner*, 483 U.S. at 284 n.16. Thus,

> "the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, *i.e.*, because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier."

Id. at 291 (quoting *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)).[8]

---

jurisdiction bears a greater financial burden than his intrastate competitor merely because he is engaging in interstate commerce with the consequent interference with free trade among the states. Hence there does not appear to be any sound policy basis for distinguishing the "fee" from the "tax" cases insofar as the application of the "internal consistency" doctrine is concerned.

Hellerstein, *supra*, 87 MICH. L. REV. at 157 (emphasis added).

[8] The Washington Supreme Court asserted on several occasions that petitioners did "not ask this court to revisit the trial court's finding that the regulatory fee was not discriminatory." App., *infra*, 7a. See *id.* at 10, 17a. This is not accurate. In fact, petitioners argued to the court below that "all flat, unapportioned taxes or fees are *inherently* discriminatory." Appellant's Rep. Br. 7 n.9

(emphasis in original). The Washington Supreme Court actually engaged and rejected this argument, refusing to find that "a failure of internal consistency *is* discrimination in fact" and holding that "[d]iscrimination in fact * * * must be proven beyond a reasonable doubt." App., *infra*, 18a (emphasis in original). Other courts, however, have held that empirical proof of discrimination is *not* required to invalidate a flat tax. As the Supreme Judicial Court of Massachusetts explained in a case that was virtually identical to this one, "[a]lthough the discriminatory impact of the fees is not precisely quantifiable because the stipulated facts do not include statistics regarding the average number of miles traveled annually in Massachusetts by local trucks and by those registered in other jurisdictions, it is intuitively obvious that local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." *American Truckingg Ass'ns* v. *Secretary of Administration*, 613 N.E.2d 95, 101 (Mass. 1993). See *Black Beauty Trucking, Inc.* v. *Indiana Dept. of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) ("[t]he discriminatory impact [of a flat tax] on the interstate carrier is readily apparent"); *American Trucking Ass'ns* v. *Goldstein*, 541 A.2d 955, 957 (Md. 1988) (court finds it sufficient that "interstate carriers[] might tend to travel fewer miles in Maryland and thus pay a higher per-mile price"); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337 (Vt. 1989) (court concludes that Scheiner held "flat highway user taxes inherently discriminatory against interstate commerce").

Further, contrary to the Washington Supreme Court's comment, the trial court *never* found that the Washington tax was not discriminatory. It simply found, in a summary judgment context, that petitioners had not yet proven that the tax was discriminatory. Petitioners made this point below, arguing that, if the Washington Supreme Court "for some reason should determine that quantifiable discriminatory impact must be proven by [petitioners] to sustain their Commerce Clause claim, the appropriate remedy on appeal is to remand this case for trial" because the trial court "never found that the Regulatory Fee was non-discriminatory or that [petitioners] could make no showing of quantifiable discrimination as a matter of law." Appellants' Reply Br. 8 n.9. The court below made no

2. The Washington tax plainly fails the internal consistency test; it is a flat, unapportioned levy that is imposed on trucks when they operate even a mile in the State of Washington[9] and that, if replicated by other States, would impose potentially crushing, cumulative burdens on trucks traveling in interstate commerce. Indeed, the court below implicitly *acknowledged* that the tax lacks internal consistency. See App., *infra*, 15a. In nevertheless upholding the constitutionality of the Washington levy, the court held that a tax need not satisfy the internal consistency test — and, in fact, is not "subject to the apportionment requirement" *at all* (*ibid.*) — so long as the revenues derived from the tax are used "for the purpose of financing regulation." *Id.* at 11a. This is so, the court reasoned, because "[t]he burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations." *Id.* at 11a (citations and internal quotation marks omitted).

---

response to this request, instead misconstruing the trial court's denial of summary judgment as constituting a determination of the merits of the discrimination claim.

[9] As noted above (at 2 n.2), the Washington scheme provides mechanisms (single trip permits and "floater cards") that may reduce — but do not eliminate — the burden imposed by the Washington tax on some interstate carriers. Manifestly, these options do not obviate the cumulative burdens imposed on interstate commerce by the Washington tax (since if imposed by all States, interstate carriers still would pay multiple taxes while intrastate carriers would pay only one), and the court below properly did not suggest that their availability satisfies the apportionment requirement. Other courts have invalidated flat taxes that included similar reduced alternative flat fees for interstate trucks that made limited use of state roads. See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Secretary of State*, 595 A.2d 1014, 1015 (Me. 1991) (holding tax unconstitutional even though scheme allowed for purchase of five-day or half-year permit in lieu of flat annual fee).

Such reasoning led the court to reject fair apportionment as a requirement and to apply the analysis of *Pike* v. *Bruce Church*, which assesses the Commerce Clause validity of regulations themselves, *not* of levies used to pay for the regulatory activity.

This holding, however, rests on a manifest evasion of this Court's precedents. As noted above, the Court has established that "[a] failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction." *Jefferson Lines*, 514 U.S. at 185. And whatever the validity of the Washington court's distinction for Commerce Clause purposes between taxes and regulations, we would have thought it obvious that a tax whose revenues are dedicated to paying for the enforcement of a regulation is just that: a tax and *not* a form of regulation. This surely is a place for application of the "quacks like a duck" principle; the Washington court's contrary conclusion, which accords taxes differing constitutional treatment depending upon what they are called and what they pay for, "has no relationship to economic realities" and "focus[es] on [a] formalism [that] merely obscures the question whether the tax produces a forbidden effect." *Complete Auto*, 430 U.S. at 288.[10]

It therefore is no surprise that the Washington court's decision to hinge the constitutionality of the tax on the uses to which the tax revenue will be put departs from this Court's holdings in several fundamental respects. *First*, the court below disregarded the undeniable fact that the effect on

---

[10] The Washington court's conclusion certainly draws no support from *Freeman* v. *Hewitt*, 329 U.S. 249, 253 (1946), cited at App., *infra*, 11a. While this Court drew a distinction in that case between taxes and regulations (*not* taxes used to support the regulations), it nowhere made the counter-intuitive suggestion that taxes are less burdensome because they *pay for* regulatory activity.

interstate commerce of the Washington tax is identical to that of the tax invalidated in *Scheiner*. In both cases the flat levies were imposed when a truck made "a commercial entrance[] into" the taxing State and therefore "plac[ed] a financial barrier around the State." *Scheiner*, 483 U.S. at 284. In both cases the taxes were of a sort that, if imposed by other States, would have a "'cumulative effect'" on interstate trucks that would "'not result from the mileage or distance traveled, but from the interstate character of the journey. The same mileage in one state would result in only one tax.'" *Id.* at 285 n.16 (quoting Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253, 1269 (1940)). And in both cases the interstate vehicle paid for something that "'[i]n the general average of instances * * * is not as valuable to the interstate as to the intrastate carrier.'" *Id.* at 291 (citation omitted).

Moreover, in neither case did the tax "maintain state boundaries as a neutral factor in economic decisionmaking," with the consequence that each tax "exert[ed] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 283, 286-287 (quoting U.S. Const., Art, I, § 8, cl. 3). As Justice Sanders noted in his dissent below, "[t]his conclusion necessarily holds true no matter how each of the states spends the resulting revenue." App., infra, 28a. Like the levy in *Scheiner*, the Washington tax accordingly "produce[d] a forbidden effect" (*Complete Auto*, 430 U.S. at 288) — and that is the crucial consideration for Commerce Clause purposes.[11]

---

[11] As Justice Sanders explained (App., *infra*, 27a-28a):

> Consider, for example, the interstate trucker on a Boston to Seattle run. The total distance is 2,508 miles requiring travel through at least 11 different states. If each state charged a flat $10.00 fee for an annual road permit, plus a gross tonnage

Second, the distinction drawn by the Washington court — that between a tax whose revenues are used "for the purpose of financing regulation" and a tax whose revenues "may be used for other purposes" (App., *infra*, 11a) — simply makes no sense at all. For reasons we have just noted, the court plainly was incorrect in suggesting (*id.* at 11a (citation omitted)) that the "'burden on interstate commerce'" is reduced in any respect because the tax revenues are used to finance regulatory activity rather than, for example, highway maintenance or subsidized bean soup for state legislators. Again, *Scheiner* provides an illustration of the point. The taxes there were imposed on all trucks that traveled Pennsylvania's roads and were dedicated to financing "road-related expenditures," including "highway maintenance." 483 U.S. at 270, 271. The burden that those taxes imposed on trucks would not have been reduced (or affected in any way) if the revenues instead had been devoted to paying for safety inspections, sobriety checks, highway patrol salaries, or any other arguably regulatory activity. Indeed, such a "regulatory fee" would, if anything, appear to be *more* burdensome than a general revenue tax because it would be part of a package that subjected trucks to a double whammy:

---

charge, the interstate trucker would pay $110.00 per year plus eleven times his applicable gross tonnage charge to ply his trade; whereas the truck with an equivalent gross number of miles wholly intrastate between Seattle and Spokane would pay but $10.00 total, plus one gross tonnage charge. Necessarily the intrastate trucker would be at a competitive advantage to his interstate counterpart because his "regulatory fee" would be less than a tenth of that required of his competitor, although the interstate trucker's use of Washington roads is considerably less. Such result discriminatorily burdens interstate commerce whether we call it a regulatory fee, a tax, or some other name.

the trucker would both pay the tax *and* bear the burden of potentially costly state regulation.[12]

Third, the test announced by the court below invites inconsistency and manipulation. Because that test is not grounded in Commerce Clause policies, there is no principled way to determine whether a given tax must be deemed a "regulatory fee." In this case, for example, the Washington court confidently declared the challenged tax to be regulatory, even though the court confined its description of the tax to the cursory assertion that the revenues it raised were used "to conduct safety inspections and programs." App., *infra*, 12a.[13]

---

[12] This is not to deny, of course, that there may be circumstances in which there are relevant distinctions between general revenue taxes and special purpose fees. Some statutes, for example, accord differing treatment to the two types of levy; several of the cases relied upon by the court below involved just that sort of statutory interpretation. See App., *infra*, 12a (citing *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974) (addressing whether a particular charge is a "fee" within the meaning of the Independent Officers Appropriation Act of 1952, 31 U.S.C. § 483a, revised and recodified at 31 U.S.C. § 5701)); *id.* at 11a (citing *Union Pac. R. Co.* v. *Public Utility Comm'n*, 899 F.2d 854 (9th Cir. 1990) (addressing whether a particular levy is a "tax" within the meaning of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503(b)). Indeed, the state-court decision from which the court below derived its test for whether a levy is a "fee" involved that sort of determination. See *id.* at 12a (citing *Covell* v. *City of Seattle*, 905 P.2d 324, 325-326 (Wash. 1995) (determining whether a levy is a property tax or a regulatory fee for purposes of a Washington State constitutional provision containing a uniformity requirement for property taxes)). But these decisions have no bearing on the question whether the purposes of the Commerce Clause permit the drawing of a similar distinction between taxes and fees.

[13] In fact, the Washington tax was used for far more than safety inspections and programs. The tax also was used by the

But is a tax "regulatory" in this sense if it is used to finance voluntary safety courses for drivers, or to pay the salaries of the highway patrol officers who "regulate" driving, or to pay *both* for truck inspections and for highway cleanup after accidents?[14] Or could a State convert an unconstitutional "tax" into a permissible "regulatory fee" simply by announcing (perhaps after the time of collection) that the revenue would pay for regulatory activity? Because Commerce Clause policies provide no answers to these questions, the Washington court's approach makes the form of the tax dispositive and invites manipulation by legislative draftsmen — a danger that is particularly acute because the court below used a *state-law* test to determine whether a levy is a "fee" and therefore exempt from the federal apportionment requirement. By the same token, the Washington court's holding would allow States to pay for a wide range of activities through the imposition of flat fees, in the process exporting much of their tax burden onto out-of-state taxpayers. The inevitable consequence of such a rule would be to "divide and disrupt the market for interstate transportation services." *Scheiner*, 483 U.S. at 285.

Washington Utilities and Transportation Committee to fund the regulation of *intrastate* trucking under RCW 81.80, which involved both economic regulation and regulation of all other practices of the carriers. See Clerk's Papers at 51, 65-68, 421, 444, 850, 863-866.

[14] That the distinction drawn by the court below is not meaningful is suggested by the terms of the test the court applied. It asks "whether the primary purpose of the monetary assessment is to accomplish desired public benefits which cost money, or to regulate an industry or activity." App., *infra*, 12a. But any fee that raises funds that are used to pay for regulatory activity surely is imposed to "accomplish desired public benefits which cost money." Here, for example, the Washington tax raised revenue to pay for state activity that would further public safety.

B. The Lower Courts Have Taken Conflicting Approaches To the Commerce Clause Apportionment Requirement

In addition to departing from this Court's precedents, the decision below contributes to considerable confusion and disarray among state courts of last resort and federal courts of appeals about the applicability of the apportionment requirement to taxes whose revenues are used to finance regulatory activity. Many courts have faithfully applied the analysis of *Scheiner*, holding in a range of settings that flat taxes on interstate commerce (in particular, on interstate motor carriers) fail the internal consistency test and therefore are unconstitutional. Other courts, however, have adopted the approach used below and departed from *Scheiner*, ruling that exactions need not be apportioned so long as they are levied to finance regulatory activity.

1. On the one hand, the Washington court's holding cannot be reconciled with a body of decisions that have applied the internal consistency test to invalidate taxes on interstate truckers, even when the tax was enacted for ostensibly regulatory purposes and even if it was denominated a "fee." In *American Trucking Ass'ns, Inc.* v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993), for example, the Supreme Judicial Court of Massachusetts struck down an impost that in all essential respects was identical to the one here. Massachusetts imposed a flat $200 fee on every vehicle that entered the State and that was engaged in the transportation of hazardous waste. The fee was used "'solely for the purpose of administration and implementation of the permitting, compliance and enforcement, monitoring and analysis, and technical assistance programs at the department of environmental protection'" (*id.* at 99 (citation omitted)); it paid for the "random inspection of vehicles, processing monthly reports, providing education and technical assistance, and enforcement." *Id.* at 102.

In holding the tax invalid under the Commerce Clause, the court began by noting that "[i]t is of no relevance what label is attached to the assessment imposed by the State" so long as the fee has "an impermissible effect on free trade." 613 N.E.2d at 99 n.9. From that starting point, the court went on to hold the tax unconstitutional, explaining that it

> appear[s] to violate the internal consistency test because the imposition of the full measure of [the] fee is triggered by an interstate truck simply crossing the border of Massachusetts and making just one commercial entry into the State. If each State imposed [a] flat fee[] of th[is] type[] for passing through its jurisdiction, an impermissible interference with free commerce would result. The * * * fee[] also appear[s] unfairly apportioned because [it is] unapportioned and unrelated to actual use of Massachusetts highways.

Id. at 101. The court found "no merit to the Commonwealth's claim that the internal consistency test does not apply to user fees" (*id.* at 102) and did not treat the use that the State made of the revenues collected under the fee as at all relevant to the Commerce Clause inquiry.

The Supreme Judicial Court of Maine reached the same conclusion in *American Trucking Ass'ns, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991), where the court invalidated another flat, annual per truck "hazardous material fee" imposed on vehicles that transported hazardous substances in the State. *Id.* at 1015. The fee was devoted, in part, to paying "costs related to vehicle inspection and enforcement" (*ibid.*); it also was used to support the state hazardous waste fund, to pay administrative costs, and to finance "hazardous materials training of state and local officials." *Ibid.* Explaining that *Scheiner* "clearly elevates substance over form," the court rejected the State's argument that the internal consistency test did not apply because the tax was characterized as a "[r]egulatory [l]icense [f]ee." *Ibid.* The

court went on to conclude that "a tariff such as the one imposed here is forbidden if it produces the prohibited discriminatory effect on interstate commerce whether designated as a 'fee' or a general revenue 'tax.'" *Id.* at 1016. That was true of the challenged levy, the court held, because

> if each state imposed such a fee, a truck traveling 100,000 miles interstate could conceivably pay 49 times more in hazardous waste tariffs than a truck that traveled 100,000 miles strictly within the state. This would clearly violate the "internal consistency test," which forbids tariffs that would interfere with free trade by penalizing some travel.

Id. at 1017.[15]

Similarly, in *Government Suppliers Consolidating Servs., Inc.* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1993), the Seventh Circuit rejected the distinction relied upon by the court below. *Government Suppliers* invalidated a flat semi-annual fee imposed on vehicles that engaged in municipal waste collection and transportation. The fees were "used to implement the waste disposal regulatory system to which registrants are subject. They d[id] not revert to the state general fund. * * * [T]heir purpose [was] regulatory * * *." *Id.* at 1271 n.2. Relying on *Scheiner*, the court nevertheless held the fee to violate the Commerce Clause because it "raises a financial barrier around the State." *Id.* at 1281. The court added that, "[i]f

---

[15] The court below attempted to distinguish *Secretary of Administration* on the ground that the Massachusetts levy was a "tax" while Washington's was a regulatory fee. App., *infra*, 15a. But the court made no attempt to justify this *ipse dixit*; it did not explain *why* the Massachusetts levy was not just as "regulatory" as Washington's. Curiously, although the Maine Supreme Judicial Court's decision in *Secretary of State* also was cited to the court below, the Washington court made no attempt to reconcile that decision with its holding in this case.

other states were to adopt registration fees similar to Indiana's, the divisive and disruptive effect on interstate commerce in municipal waste would be magnified." *Id.* at 1282. Again, the court did not treat the regulatory purpose of the fee as in any way relevant to the Commerce Clause inquiry.[16]

2. Other courts, however, have adopted the approach taken below, holding that the apportionment requirement does not apply to exactions that are used to finance regulatory activity. Thus, in *Interstate Towing Ass'n* v. *Cincinnati*, 6 F.3d 1154 (6th Cir. 1993), the Sixth Circuit upheld Cincinnati's $80 annual fee imposed on operators of automobile towing services. The court treated the internal consistency test as inapplicable because "the City is simply trying to regulate what it reasonably thinks is a potentially dangerous or troublesome activity." *Id.* at 1165. In contrast to the tax invalidated in *Scheiner*, the court reasoned, "the City's fee is assessed to help defray the costs of inspecting towing vehicles to ensure that all trucks providing towing

---

[16] In addition, many other courts have invoked *Scheiner* to invalidate a wide range of flat taxes or fees without suggesting that their purpose, or the use to which the revenue they generated was put, had any bearing on the analysis used to determine their constitutionality. See, *e.g.*, *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992) (invalidating flat annual fee used to support no-fault insurance fund); *Kentucky* v. *American Trucking Ass'ns*, 746 S.W.2d 65, 67 (Ky. 1988) (invalidating flat highway privilege tax); *Black Beauty Trucking, Inc.* v. *Indiana Dept. of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) (invalidating flat highway privilege tax); *American Trucking Ass'ns* v. *Goldstein*, 541 A.2d 955, 957-958 (Md. 1988) (invalidating flat fuel tax registration fee); *American Trucking Ass'ns, Inc.* v. *State*, 556 N.W.2d 761 (Wis. Ct. App.) (invalidating flat hazardous waste transportation fee), rev. denied, 560 N.W.2d 274 (Wis. 1996); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337-1338 (Vt. 1989) (invalidating flat fuel-user license fee).

services within City limits, Ohio-based and out-of-state-trucks alike, meet certain standards of safety." *Id.* at 1162-1163. The Sixth Circuit therefore applied only the *Pike* test and proceeded to hold the tax constitutional. *Id.* at 1163-1165.

Similarly, in *V-1 Oil Co.* v. *Utah State Dept. of Public Safety*, 131 F.3d 1415 (10th Cir. 1997), the Tenth Circuit upheld a flat Utah license fee and $30 annual fee imposed for each employee of entities that sell liquefied petroleum gas ("LPG") in the State. See *id.* at 1418. Like the court below, the Tenth Circuit applied a state-law test to determine whether the levy should be characterized as a "tax" or a "fee," concluding that it was a "regulatory police power fee" (*id.* at 1422) because it was "assessed to help defray the costs of inspecting LPG facilities and to ensure that all LPG handlers providing LPG services within the State of Utah met minimum standards of safety." *Id.* at 1423. The court therefore analyzed the tax under the standards announced in *Pike* and held it constitutional. See *id.* at 1423-1427. See also *Dept. of Banking & Finance* v. *Credicorp, Inc.*, 684 So.2d 746, 752 (Fla. 1996) (upholding a flat $200 semiannual fee on retail installment sellers on the understanding that the *Complete Auto* test applies only to "general revenue" taxes).

This flat inconsistency in the approaches of the lower courts warrants this Court's attention. Courts are applying the Commerce Clause in fundamentally differing ways, leading to the invalidation in some jurisdictions of taxes that are identical to those that have been upheld elsewhere. In these circumstances, the Court should grant review to bring uniformity to this important area of the law.

C. The Question Presented Here Is An Important And Recurring One

For the reasons set out above, the Washington court's holding both departs from this Court's decisions and exacerbates a conflict among the lower courts. This case also satisfies the remaining requisite for review by this Court:

notwithstanding the prospective repeal of the Washington tax, the question presented here — whether a State may avoid apportioning its taxes so long as it devotes the tax revenue to the financing of regulatory activity — is a recurring one of continuing practical importance.

First, as the conflict in the lower courts makes clear, jurisdictions across the Nation continue to impose unapportioned taxes on interstate commerce — and, indeed, many impose flat taxes on interstate motor carriers that are indistinguishable in principle from the Washington tax at issue in this case. A number of States, for example, impose flat per-vehicle or per-carrier fees on transporters of hazardous materials.[17] Revenues from these fees typically are devoted

---

[17] See, *e.g.*, Cal. Vehicle Code §2502(c) ($100 motor carrier permit fee and $75 motor carrier renewal permit fee); Col. Rev. Stat. Ann. § 42-20-202(b), (c) (transporters of hazardous waste pay flat annual fee, depending on number of vehicles operated in State, of $10 to $400; $25 single trip permit); Conn. Gen. Stat. Ann. § 22a-454(a) ($500 annual fee on transporters of hazardous waste); Code Del. Reg. § 10-400-007 ($300 annual fee on transporters of hazardous waste); Ga. Code § 46-11-4 (i) ($100 annual motor carrier company permit fee); Iowa Code Ann. § 455B.424(5)(c) ($25 fee for transporters of hazardous waste); Kan. Ad. Reg. § 28-31-10(f) ($250 annual "monitoring fee" on transporters of hazardous waste); Md. Code Ann. § 7-252(a)(2), (b)(2)(ii) (annual $50 vehicle certificate fee for hazardous materials transporters; annual $20 driver certificate fee); Mich. C.L.A. § 29.473(b)(3) (in addition to apportioned fee, transporters of hazardous waste pay $50 "administrative fee"); Minn. Stat. Ann. § 221.0355(4)(b) (in addition to apportioned fee, transporters of hazardous waste pay $50 "processing fee"); Nev. Rev. Stat. § 459.9805(1)(b), (d) ($125 "general processing fee" for transporters of hazardous materials; $500 triennial "permit review fee"); N.J. Stat. Ann. §§ 7:26G-3.3(g) and 28 N.J.R. 1693, 1735 (Apr. 1, 1996) (flat hazardous waste transporter fee of $21 per cab, $85 per transport unit with a capacity of less than one ton, $191 per transport unit having a

to regulatory, enforcement, and administrative expenses identical to those found dispositive by the Washington Supreme Court.[18] The validity of the test used below to

---

capacity greater than one ton, and $212 per cab and permanently attached unit with a capacity greater than one ton); N.M. Stat. Ann. § 74-4F-3(C) (annual $250 hazardous waste transporter permit fee; $75 single shipment hazardous waste fee); N.Y. ECL § 72-0502 (hazardous waste transporter pays annual $500 fee for first vehicle, $200 fee for each additional vehicle; other waste transporters pay $250 annual fee for first vehicle and $100 for each additional vehicle); N.C. Gen. Stat. § 130A-294.1(j) ($600 annual fee on transporters of hazardous waste); Ohio Rev. Code § 4905.80(C)(1)(a) (in addition to apportioned fee, hazardous waste transporters pay $50 "processing" fee); Tenn. Code Ann. § 68-212-203(a)(6)(C) ($650 annual fee on each person issued hazardous waste transporter permit); Tex. Natural Resources Code § 113.131k (d)(1) (liquefied petroleum gas trailers and delivery units pay flat annual fee of $100 to $300); Tex. Natural Resources Code § 116.072 (c)(1) (trailers and delivery units transporting compressed natural gas pay flat annual fee of $100 to $500); Wy. Stat. § 37-14-103 ($200 fee for each package of radioactive material transported in State).

[18] See, *e.g.*, Col. Rev. Stat. Ann. §§ 42-20-107, -202(5) (fee placed in hazardous materials safety fund and used for safety and administration purposes); Conn. Gen. Stat. Ann. § 16a-106(c) (fee used for "administering the provisions of this section"); 7 Del. Code Ann. § 6006(5)) (fee used "to carry out the purposes of this chapter"); Kan. Stat. Ann. § 65-3431(u) (fee used "for monitoring the transportation of hazardous wastes"); Mich. C.L.A. § 29.475(4) (fee devoted to "implementation of this act"); N.J. Stat. Ann. § 13:1E-18 and N.J.R. 1995(a), 1996 (Aug. 15, 1988) (fees devoted to "services to be performed," including hazardous waste transporter enforcement operations, special investigations, and roadside checks); N.Y. ECL § 72-0201(11)(b) (one-half of hazardous waste transporter fees used "for the purposes of carrying out the provisions of this chapter"); N.C. Gen. Stat. § 130A-294.1(b) (fee used to provide technical assistance, facilitate "timely

uphold the Washington tax accordingly raises a vital question that will have to be addressed by this Court sooner or later. This case offers an entirely suitable vehicle with which to do so.

Second, the Washington court's decision will foment continuing litigation about the validity of unapportioned taxes. In response to the holding in *Scheiner*, several States candidly acknowledged that their flat motor carrier fees were unconstitutional.[19] But other States began a lengthy and continuing campaign to circumvent *Scheiner* by arguing, for example, that apportionment of their flat taxes was impracticable and therefore unnecessary,[20] or by contending that their taxes *were* per se properly apportioned because they were "user fees,"[21] or by asserting that the apportionment requirement was inapplicable because the costs imposed upon the State were unrelated to the miles traveled by the taxpayer in the jurisdiction.[22] The decision below marks the latest skirmish in this campaign, and the first in which a State has been successful in defending a flat tax on interstate motor carriers. If not set aside, that decision will provide powerful

---

review of permit applications," insure that permit decisions are made on a sound basis, "[i]mprove monitoring and compliance of the hazardous waste management program," "[i]ncrease the frequency of inspections," provide support for the waste management program, and provide resources for emergency response).

[19] See, *e.g.*, *Goldstein*, 541 A.2d at 957, 958; *Conway*, 566 A.2d at 1337.

[20] See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *State*, 566 N.W.2d at 767-768.

[21] See, *e.g.*, *Secretary of Administration*, 613 N.E.2d at 101-103.

[22] See, *e.g.*, *Secretary of State*, 595 A.2d at 1016.

support and encouragement for substantial additional litigation in this area.[23]

Third, the decision below will leave state and local governments in confusion about the rules governing their taxing authority. When presented with the Washington Supreme Court's decision and conflicting holdings by other courts, legislators contemplating the enactment of new tax measures will not know whether unapportioned fees are constitutional so long as the revenues are dedicated to regulatory purposes. At the same time, legislators in jurisdictions that now have such fees will not know whether they are obligated to repeal or modify them — a matter of considerable practical importance, because continued collection of unconstitutional taxes may make the taxing jurisdiction liable for very substantial refund liability. See, *e.g.*, *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529 (1991); *McKesson Corp.* v. *Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). If flat "regulatory fees" are constitutional, legislators should be so informed and permitted to exercise their taxing authority freely; if those fees violate the Commerce Clause, the governing rules should be stated clearly so that States and localities may conform their taxes to constitutional requirements.

Fourth, the validity of the Washington tax is a matter of great importance to the taxpayers in this case, who continue to seek relief in the form of refunds. Those taxpayers were compelled to pay what we regard as a patently

---

[23] Indeed, in litigation now pending in New Jersey, the State is defending a flat truck tax with arguments identical to those adopted by the court below in this case. *American Trucking Ass'ns, Inc.* v. *State of New Jersey*, No. A-0006334-97T3F (N.J. Super. Ct. App. Div.) See N.J. Br. 1 (levies should be upheld and *Scheiner* found inapplicable because challenged levies are "regulatory user fees, and not general revenue-raising taxes").

unconstitutional tax — and then were frustrated at every turn by the state courts as they attempted to obtain relief. The trial court recognized that the tax was unconstitutional, but disregarded *McKesson* and the other clear precedents of this Court that mandated the payment of refunds. The Washington Supreme Court took an equally insupportable tack, disregarding a different set of precedents to uphold the tax outright. Having forced the taxpayers to pay an unconstitutional levy, the State should not succeed in circumventing review and keeping the revenue by repealing the invalid provision after its unconstitutional demand has been satisfied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES H. HANSON
LYNNE D. LIDKE
ROBERT L. BROWNING
Scopelitis, Garvin, Light & Hanson, P.C.
10 West Market St.
Suite 1500
Indianapolis, IN 46204
(317) 637-1777

ANDREW L. FREY*
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

FEBRUARY 1999

APPENDIX

APPENDIX A

FRANKS & SON, INC. AND COAST EXPRESS, INC.,
on behalf of themselves
and all others similarly situated, Appellants,

v.

THE STATE OF WASHINGTON; WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION;
AND OFFICE OF THE STATE TREASURER, Respondents.

No. 65255-4.

Supreme Court of Washington,
En Banc.

Argued Feb. 11, 1998.

Decided Nov. 12, 1998.

DOLLIVER, J.

In 1990, Plaintiffs Franks & Son, Inc. and Coast Express, Inc. brought a class action suit on behalf of themselves and all other similarly-situated interstate truckers challenging the gross weight regulatory fee imposed by former RCW 81.80.320. That statute was repealed in 1993 and replaced with RCW 81.80.321, which imposes a fee based on gross income from operations occurring inside Washington state. In 1996, the Thurston County Superior Court held the repealed statute violated the Commerce Clause of the United States Constitution but, in a declaratory ruling, granted the Plaintiffs only prospective relief. Both parties directly appealed that decision. The Plaintiff-taxpayers argue they are entitled to retroactive relief in the form of a refund of taxes paid. The State maintains the former statute was valid under the Commerce Clause and, in the alternative, that any holding of unconstitutionality should be prospective only. We retained the case and now reverse, finding the repealed statute imposed a constitutional regulatory fee. We decline to reach the issue of the trial court's remedy.

The State of Washington regulates the trucking industry and formerly funded all of the associated costs with a regulatory fee, the proceeds of which could be used only to offset the costs of regulation. Laws of 1971, 1st Ex. Sess., ch. 143, § 5, previously codified as RCW 81.80.320. The regulatory fee at issue was required by former RCW 81.80.320, which was repealed effective January 1, 1994, and provided:

> In addition to all other fees to be paid by him, every "common carrier" and "contract carrier" shall pay to the commission each year prior to receiving his identification decal or stamp or number for each motive power vehicle operated by him, based upon the maximum gross weight thereof as set by the carrier in his application for his regular license plates, plus any additional tonnage or log tolerance permits, the following fees: [Fees ranged from $7 for vehicles weighing less than 4,000 pounds to $48 for vehicles weighing 72,000 pounds or more.]
>
> It is the intent of the legislature that the fees collected under the provisions of this chapter shall reasonably approximate the cost of supervising and regulating motor carriers subject thereto, and to that end the utilities and transportation commission is authorized to decrease the schedule of fees provided in this section by general order entered before November 1st of any year in which it determines that the moneys then in the motor carrier account of the public service revolving fund and the fees currently to be paid will exceed the reasonable cost of supervising and regulating such carriers during the next succeeding calendar year. Whenever the cost accounting records of the commission indicate that the schedule of fees as previously reduced should be increased such increase, not in any event to exceed the schedule set forth in this section, may be effected by a similar general order entered before November 1st. Any decrease or increase

> of gross weight fees as herein authorized, shall be made on a proportional basis as applied to the various classifications of equipment.

The annual regulatory fee was imposed in addition to a federally authorized "identification fee" which Congress and the Interstate Commerce Commission (ICC) established to offset state costs for filing and processing carriers' proof of interstate operations. Former RCW 81.80.300 made it unlawful for any carrier to operate vehicles within Washington unless both the identification fee and the regulatory fee were paid:

> It shall be unlawful for any "common carrier" or "contract carrier" to operate any motor vehicle within this state unless there is carried within the cab of the motive power vehicle ... the identification cab card and decal or stamp or number required by this section and the payment by such carrier of a total fee of up to ten dollars for each such decal or stamp or number plus the applicable gross weight fee prescribed by RCW 81.80.320[.]

The regulatory fees were the Washington Utilities and Transportation Commission's (UTC) sole source of funding for the motor carrier safety enforcement program, which was one component of "supervising and regulating motor carriers." Former RCW 81.800.320. Within statutory ceilings, the UTC set the fee by order each August or September for the following year, and the carriers were notified of the amount shortly thereafter.

Unlike the federal fee, state law also allowed the UTC to establish alternatives to the per vehicle fee for carriers which traveled in interstate commerce and entered Washington infrequently. The UTC made such allowances by establishing single trip permits and "floater cards" which permitted carriers to purchase a limited number of such cards and transfer them

among vehicles as they were sent into the state. Former RCW 81.80.300; RCW 81.80.318.

This case involves a constitutional challenge to the regulatory fee imposed by the UTC pursuant to former RCW 81.80.320, which was repealed effective January 1, 1994. In their complaint, filed in March 1990, Plaintiffs sought declaratory, injunctive, and refund relief on behalf of the following class certified by court order in September 1990:

> All interstate motor carriers whose vehicles travel in and through the State of Washington and are therefore subject to and pay the regulatory fee pursuant to RCW 81.80.320.

Clerk's Papers at 332. The Plaintiffs made two constitu-tional claims. First, they contended the regulatory fee was unconstitutional because it imposed an unlawful burden on interstate commerce pursuant to the United States Supreme Court's "dormant" or "negative" Commerce Clause analysis in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987). Plaintiffs claimed:

> The Regulatory Fee imposes an unappropriated, flat tax on Carriers unrelated to the actual miles a Carrier's motive power vehicles travel in Washington. The Regulatory Fee, therefore, imposes, on average, a higher cost per mile traveled in Washington on the motive power vehicles of Plaintiffs and all members of Plaintiffs' class that are not operated wholly within Washington than in the motive power vehicles of motor common or contract carriers that are operated wholly within Washington.

Clerk's Papers at 13. This claim became known as the "Scheiner " claim.

Second, Plaintiffs alleged the fee was preempted by federal law, specifically the Interstate Commerce Act, 49 U.S.C. § 11506, and its implementing regulations, and was thus imposed in violation of the Commerce Clause and its

affirmative reservation of power to Congress to regulate commerce between the states. This claim became known as the "preemption" claim.

In April 1990, Plaintiffs sought a preliminary injunction requiring the State to place into escrow regulatory fee proceeds not yet expended together with all fees collected pending the outcome of the case. The request was based on Plaintiffs' claim that, should they ultimately prevail on the merits, the State might assert an immunity defense to any refund claim.

In July 1990, the trial court issued an oral opinion denying the motion, noting that refunds would be "questionabl[e]." Clerk's Papers at 283. Addressing the Scheiner claim, the court acknowledged the necessity of proving discrimination with a factual showing:

> In Scheiner, of course, taxes were collected for highway construction and repair, which is necessarily correlated with the number of miles traveled. The regulatory fees at issue here fund various programs, including a vehicle safety inspection program. Although these inspections and the safety issues may well be directly related to miles traveled, as in the Scheiner case, this correlation has not at this juncture been established by the evidence.

Clerk's Papers at 280. The trial court concluded that "without that evidence, the court cannot determine that the plaintiffs are likely to prevail on the merits." Clerk's Papers at 281. The trial court also noted the Plaintiffs could protect themselves by bringing the matter to the merits before the next round of fee payments were due. In a later written order denying Plaintiffs' motion, the trial court reiterated its hesitance to rule favorably on the Scheiner claim in the absence of supporting evidence and found Plaintiffs were not likely to prevail on the preemption claim either.

Before the next year's fees were due, all parties moved for summary judgment. In March and April 1991, the trial court issued a letter opinion and corresponding order denying the parties' cross motions for summary judgment on the Scheiner claim and reaffirming its earlier view that the preemption claim should be denied. With respect to the Scheiner claim, the trial court again noted it was Plaintiffs' burden to prove the "factual unfairness" of the regulatory fee, or, in other words, to produce evidence of discrimination. The trial court stated:

> When Plaintiffs in this case sought temporary relief, the state argued, and I agreed, that those challenging the regulatory fee through commerce clause analysis have the burden of proving factual unfairness of the tax burden's effect on interstate commerce. Basically, Plaintiffs still have offered no admissible evidence on the issue....

Clerk's Papers at 939-40.

From March 1991 to April 1996, further pursuit of discovery and various attempts to resolve the case through alternative means ensued. In the interim, the regulatory fee legislation was repealed by Laws of 1993, ch. 97, § 7. (Federal legislation in the form of the Intermodal Surface Transportation Efficiency Act of 1991, Pub.L. No. 102-240, 105 Stat.1914, intervened, authorizing the ICC to create a base state registration system for interstate carriers. Each state could impose a fee in lieu of the registration fee, not to exceed that amount earlier charged (in Washington's case, $10), and that fee would be collected by the carriers' base state and then transmitted to each state imposing the fees. The Congressional decision that each state could not register all carriers doing business in that state made it administratively difficult to impose any further regulatory fee in addition to the base state fee. The regulatory fee was therefore repealed on the date of the implementation of the base state program—January 1, 1994.)

In April 1996, Plaintiffs filed a second motion for summary judgment. They again challenged the regulatory fee on the basis of both the preemption claim and the Scheiner claim. This time they supported the Scheiner claim with a discrimination analysis which attempted to show that members of the Plaintiffs' class paid more per mile in fees than nonclass members. In their cross motion for summary judgment, the State successfully rebutted this evidence. In a declaratory ruling, the trial court determined federal law did not preempt imposition of the regulatory fee. Moreover, Plaintiffs had not demonstrated that the fee was discriminatory. Nevertheless, the trial court held the regulatory fee violated the Commerce Clause because it was not fairly apportioned—specifically, it failed the "internal consistency" test required by dormant Commerce Clause analysis. The court found the regulatory fee was "much like" the fees charged users in Scheiner and was therefore subject to the internal consistency test for fair apportionment, which it failed. Clerk's Papers at 1506. The trial court ruled its decision should not be applied retroactively and denied Plaintiffs' request for a refund of taxes paid.

Plaintiffs now appeal, claiming they are entitled to retroactive relief, i.e., a full refund of fees paid since March 1987. Plaintiffs also ask this court to find the trial court wrongly decided the preemption claim. They do not appeal any of the rulings associated with the Scheiner claim (on which they prevailed); specifically, they do not ask this court to revisit the trial court's finding that the regulatory fee was not discriminatory.

The State cross-appeals, arguing the regulatory fee was not a tax and did not discriminate against interstate commerce; therefore, it claims, the trial court should not have declared it internally inconsistent (one measure of unfair apportionment) and hence unconstitutional. The State also responds to Plaintiffs' claims on appeal, arguing even if the regulatory fee

was unconstitutional, retroactive application of the trial court's ruling is not warranted. Finally, the State counters that Congress did not preempt the regulatory fee.

We hold the repealed statute imposed a regulatory fee—not a tax—and did not violate the Commerce Clause. Because we find the fee was constitutionally sound, we do not address the Plaintiffs' argument that they are entitled to refunds of fees paid.

U.S. Const. art. I, § 8, cl. 3, known as the Commerce Clause, states: "The congress shall have power ... [t]o regulate commerce with foreign nations, and among the several states[.]" The Commerce Clause does not forbid states from regulating interstate carriers for safety and other purposes, even if the scope of the state regulation differs from that of other states and imposes burdens on interstate commerce. See, e.g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523-24, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959). Likewise, a state may impose a fee to offset the appropriate costs of regulation. See, e.g., *Great N. Ry. Co. v. Washington*, 300 U.S. 154, 160, 57 S.Ct. 397, 81 L.Ed. 573 (1937); *Sprout v. City of South Bend*, 277 U.S. 163, 169, 48 S.Ct. 502, 72 L.Ed. 833 (1928). Indeed, even in the tax context, interstate commerce may be made to "pay its [own] way." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). The first question at issue here is whether the means by which Washington opted to fund its regulatory program violated the "dormant" or "negative" implications of the Commerce Clause.

On its face, the Commerce Clause is an affirmative grant of power to Congress. However, the negative implication of the clause—that the states cannot exercise power reserved to Congress—is the source of constitutional limits on state regulation and taxation of interstate commerce. Department of *Banking & Fin. v. Credicorp, Inc.*, 684 So.2d 746

(Fla.1996), cert. denied, --- U.S. ---, 118 S.Ct. 71, 139 L.Ed.2d 31 (1997).

Negative or "dormant" Commerce Clause analysis was at work in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987). In Scheiner, the United States Supreme Court held Pennsylvania's annual flat highway use taxes were "plainly discriminatory" because they imposed a cost per mile on interstate truckers that was approximately five times as heavy as the cost per mile borne by local truckers. *Scheiner*, 483 U.S. at 286, 107 S.Ct. 2829. Pennsylvania's flat taxes for the use of its roads also failed the "internal consistency" test, which, along with "external consistency," measures whether a tax is fairly apportioned. Internal consistency requires a state tax to "be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Scheiner*, 483 U.S. at 284, 107 S.Ct. 2829 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984)). The Court concluded:

> If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Scheiner, 483 U.S. at 284, 107 S.Ct. 2829 (footnote omitted).

The trial court analogized the regulatory fee at issue in this case to the flat highway use Scheiner taxes and found it did not pass the internal consistency test. It reached several crucial conclusions in its declaratory ruling. As a threshold matter, it declared former RCW 81.80.320 was facially neutral, i.e., it did not discriminate between interstate and intrastate carriers. Neither party contests this finding. Indeed, class carriers in this case paid the same as nonclass carriers; the regulatory fee was imposed on both.

Plaintiffs' claim on summary judgment, however, was that former RCW 81.80.320 was discriminatory in fact. Plaintiffs alleged that interstate carriers, generally, traveled fewer miles per year in Washington than intrastate carriers and therefore paid more per mile for the safety program, which the regulatory fee funded, than did intrastate carriers. Plaintiffs buttressed this allegation with the theory that the "burden" placed on Washington, which the safety program (and therefore the regulatory fee) was intended to ameliorate, was directly related to the miles traveled by each carrier. The trial court was not satisfied there was a relationship between miles and costs and therefore found the Plaintiffs had not proven the regulatory fee was discriminatory. Plaintiffs do not take issue with this portion of the ruling on appeal.

Having found there was no discrimination in fact, the trial court next addressed the question of "internal consistency" and asked whether imposition of a monetary assessment identical to the one in question by every other state would add no burden to interstate commerce that intrastate commerce would not also bear. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). Because all states experience safety issues within their boundaries, the trial court reasoned, similar fees could be imposed, thereby creating a potential for multiple burdens on interstate commerce. The regulatory fee at issue therefore failed the internal consistency test. As a result, it was malapportioned and ran afoul of the Commerce Clause.

The problem with this analysis is that a *regulatory fee* is different from a *tax*. This dichotomy is more than semantics because, where *regulatory fees* have been found not discriminatory, apportionment, and therefore the internal consistency test, has not been at issue in the majority of cases. Having found the regulatory fee was not discriminatory, the trial court wrongly addressed apportionment.

The regulatory, police power of a state and its power to tax are treated differently for constitutional purposes.

> "[T]he burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations." *Freeman [v. Hewit*], 329 U.S. [249, 253, 67 S.Ct. 274, 91 L.Ed. 265 (1946)]. Because "[t]he power to tax is a dominant power over commerce .... [a]ttempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of [interstate] commerce." *Id.*

V-1 Oil Co. v. Utah State Dep't of Pub. Safety, 131 F.3d 1415, 1422-23 (10th Cir.1997). "Thus, determining the nature of the statute at issue is pivotal for purposes of analysis under the Commerce Clause." *Department of Banking & Fin.*, 684 So.2d at 750 (citations omitted).

A tax is imposed under a state's taxing power, while a fee is imposed under a state's regulatory power. Revenues from a fee are used exclusively for the purpose of financing regulation; revenues from a tax may be used for other purposes. In *Union Pac. R.R. Co. v. Public Util. Comm'n*, 899 F.2d 854 (9th Cir.1990), the Ninth Circuit held a regulatory fee imposed by Oregon was not a tax and therefore fell outside the scope of the prohibition in the Railroad Revitalization and Regulatory Reform Act (4-R Act) on state taxes that discriminate against rail carriers. Oregon's fee was similar to the UTC's regulatory fee in that none of the fee went to the general fund or was used for any purpose other than regulation. *Union Pac. R.R. Co.*, 899 F.2d at 857. The Ninth Circuit distinguished between the taxing power and the power to regulate commerce, stating:

> [T]he concerns underlying the constitutional limitations imposed on the taxing power by article I, section 8 are

> relevant to measures having the primary objective of raising revenues for the general support of government, but not to measures having the primary objective of regulating commerce. Thus, a levy to collect the costs of regulation from those regulated is not to be treated as a tax to which the limitations of article I, section 8 apply.

Union Pac. R.R. Co., 899 F.2d at 859 (citations omitted).

Whether an exaction is a tax or a fee depends on whether its purpose is to raise revenue or to regulate an industry or services. See, e.g., *National Cable Television Ass'n v. United States*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974). A tax is defined as a levy made for the purpose of raising revenue for a general governmental purpose; a fee is enacted principally as an integral part of the regulation of an activity and to cover the cost of regulation. *American Trucking Ass'ns v. O'Neill*, 522 F.Supp. 49 (D.Conn.1981).

We recently articulated a three-part test to determine whether a charge imposed by a governmental entity is a fee or a tax. The first factor to consider is whether the primary purpose of the monetary assessment is to accomplish desired public benefits which cost money, or to regulate an industry or activity. If the primary purpose is to raise revenue, rather than to regulate, then the charge is a tax. "Conversely, if the primary purpose is regulatory, 'the charges are properly characterized as "tools of regulation," rather than taxes.'" *Covell v. City of Seattle*, 127 Wash.2d 874, 879, 905 P.2d 324 (1995) (quoting *Teter v. Clark County*, 104 Wash.2d 227, 239, 704 P.2d 1171 (1985)). The primary purpose of the fee in this case was to regulate the trucking industry, and specifically to conduct safety inspections and programs.

The second factor which we consider is whether the money collected must be allocated only to the authorized regulatory purpose. *Id.* Under the repealed statute at issue

here, the proceeds of the regulatory fee could be used only to offset the costs of regulation. Plaintiffs do not dispute this.

The third and final inquiry is whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer. "Where such a relationship exists, then the charge may be deemed a regulatory fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by the fee payer." *Id.* (citations omitted). Again, revenues from the regulatory fee in this case could be used only for the regulation of carriers; the Plaintiff class contains the vast majority—95 percent—of the carriers. Moreover, the fee was designed to rise (up to a statutory ceiling of $48) or fall, depending upon the actual costs of regulation. Former RCW 81.80.320.

We hold the repealed statute imposed a regulatory fee, not a flat tax. It remains to be determined whether the regulatory fee was unfairly apportioned and therefore violated the Commerce Clause, as the trial court held. We wish to address the trial court's rulings in context, however, and to do so, detour for a brief overview of the apportionment issue before turning to our analysis of the regulatory fee.

The United States Supreme Court has required that any state tax on interstate commerce must be (1) applied to an activity with a substantial nexus to the taxing state; (2) fairly apportioned; (3) nondiscriminatory against interstate commerce; and (4) fairly related to the services provided by the state, in order to pass constitutional muster. Complete *Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

If the regulatory fee were a tax, as Plaintiffs argue, then the question in this case would be whether the tax was properly apportioned within the meaning of the second prong

of the Complete Auto test, "the central purpose [of which] is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989). The threat of malapportionment is assessed by asking whether the tax is "internally consistent" and, if so, whether it is "externally consistent" as well. The trial court in this case did not reach the question of external consistency, which looks to the economic justification for the State's claim upon the value taxed.

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995).

Although it found the regulatory fee was not discriminatory (under the third prong of the Complete Auto test), the trial court found it failed the internal consistency test, was therefore unfairly apportioned, and as such, violated the Commerce Clause. The trial court acknowledged that problems of highway safety requiring a safety program in Washington are problems common to all states, which could duplicate a regulatory fee on interstate carriers because the

safety issues within their boundaries are similarly implicated. This "potential for multiple burdens" on interstate commerce rendered the regulatory fee unfairly apportioned. Clerk's Papers at 1507.

Plaintiffs ask this court to accept the trial court's analysis, which holds that a finding of internal inconsistency alone, in the absence of discrimination in fact, invalidates a tax under the Commerce Clause. Plaintiffs are correct in pointing out courts, on internal consistency grounds, have overturned flat taxes imposed on interstate motor carriers without requiring proof of quantifiable discrimination. See, e.g., *American Trucking Ass'ns v. State*, 205 Wis.2d 494, 556 N.W.2d 761 (Wis.Ct.App.), review denied, 207 Wis.2d 285, 560 N.W.2d 274 (1996); *American Trucking Ass'ns v. Secretary of Admin.*, 415 Mass. 337, 613 N.E.2d 95 (1993).

The State, on the other hand, does not argue the regulatory fee was properly apportioned. Instead, it argues, and we agree, that the regulatory fee was not a tax subject to the apportionment requirement. Specifically, the State maintains a nondiscriminatory "fee" (as opposed to a tax) need not be apportioned. The cases cited by Plaintiffs for the proposition that a nondiscriminatory assessment may nevertheless be overturned on internal consistency grounds dealt overwhelmingly with taxes, not regulatory fees.

Courts have rejected claims that regulatory fees must be apportioned. See, e.g., *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415 (10th Cir.1997); *Interstate Towing Ass'n v. City of Cincinnati*, 6 F.3d 1154 (6th Cir.1993). Moreover, there are policy reasons that apportionment rationale should not be extended to nondiscriminatory regulatory fees. As the State points out, if regulatory fees must be apportioned, then other state or local regulatory fees designed to offset the legitimate costs of regulation would be jeopardized. For instance, various state agencies' licensing or filing fees intended to recoup even a portion of

administrative costs could be at risk. See also Walter Hellerstein, Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation, 87 Mich. L.Rev. 138 (1988). Professor Hellerstein identified "professional and similar licensing fees that are imposed by every state" as possible victims of strict application of internal consistency to nondiscriminatory regulatory fees:

> Many of these fees are flat and unapportioned, and, for that reason, could be challenged under the "internal consistency" rationale.... One feature of these licensing fees, however, arguably insulates them from challenge under the "internal consistency" doctrine. In contrast to ... exactions ... presumed to be imposed for general revenue purposes pursuant to the state's taxing power, the levies considered here are presumed to be imposed for regulatory purposes pursuant to the state's police power. However thin that distinction may be in some cases, it is a distinction the law recognizes, and the question for present purposes is whether it is a distinction that makes a constitutional difference insofar as commerce clause (and "internal consistency") analysis is concerned.

Hellerstein, 87 Mich. L.Rev. at 156 (footnotes omitted).

Turning now to the promised analysis of the regulatory fee under the Commerce Clause, we note that the stringent standard for appraising tax measures does not apply where the statute at issue qualifies as a regulatory measure:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that

> will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities....

Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (citation omitted); see also *Department of Banking & Fin. v. Credicorp, Inc.*, 684 So.2d 746, 752-53 (Fla.1996) (inquiring "(1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.") (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979)).

The regulatory fee in this case was undeniably evenhanded. It was applied to class and nonclass carriers alike. The trial court found the regulatory fee was not discriminatory, and Plaintiffs do not contest this finding. The State argues the regulatory fee did not discriminate against interstate commerce, and, in any event, Plaintiffs were unable to provide evidence that it did. The State is correct. The regulatory fee was imposed on in-state and out-of-state carriers alike. Moreover, the Plaintiffs were unable to prove the regulatory fee forced them to bear a higher cost per mile than intrastate carriers, and the trial court stated Plaintiffs had not proven discrimination in fact.

What Plaintiffs appear to be claiming on appeal is that a failure of internal consistency is tantamount to discrimination, and that the trial court was "simply wrong" in not recognizing this. Br. of Appellants at 25. The problem with Plaintiffs' argument is that, even if the Complete Auto test applied in this case, unfair apportionment (and therefore internal consistency) is different from discrimination in fact. The

apportionment issue which internal consistency is designed to address looks to the potential for multiple burdens on interstate commerce; internal consistency "asks nothing about the degree of economic reality reflected by the tax[.]" *Oklahoma Tax Comm'n*, 514 U.S. at 185, 115 S.Ct. 1331. Discrimination in fact, however, must be proven beyond a reasonable doubt. *High Tide Seafoods v. State*, 106 Wash.2d 695, 698, 725 P.2d 411 (1986). The Plaintiffs are essentially bootstrapping, asking this court to find a failure of internal consistency *is* discrimination in fact. We decline to do so, especially in the context of regulatory fees, which are not required to be fairly apportioned.

Our second inquiry is whether the repealed statute served a legitimate local purpose. Plaintiffs do not dispute that the State of Washington has a legitimate interest in the regulation, inspection, and safety of trucks using state highways and roads. Indeed, the United States Supreme Court has "recognized the peculiarly local nature" of regulating interstate carriers for safety purposes. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959); see also *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978) (stating, "In no field has ... deference to state regulation been greater than that of highway safety regulation.").

We are convinced the regulatory fee served the legitimate local purpose of funding safety programs and inspections related to trucks on Washington's roads. It is worth noting that Plaintiff carriers pose significant safety concerns not posed by carriers which operate solely in state. For example, Plaintiff carriers are typically away from their bases for two to three weeks at a time, precluding service and maintenance from being performed on their vehicles. Intrastate carriers, on the other hand, are generally back at their bases each night, and as a result are closer to and more likely to avail themselves of maintenance facilities. Another significant

safety consideration is the fact that class carriers are paid on a mileage basis, which provides a powerful economic incentive to drive longer hours at a higher speed. Intrastate carriers, on the other hand, are not paid on a mileage basis. We also note *Franks & Son, Inc. and Coast Express, Inc.*, the class representatives in this case, have each been cited for numerous violations of state safety rules. *Franks & Son, Inc.* was cited several times for, among other things, hours-of-service violations. *Coast Express, Inc.* was cited 11 times during the period from January 1, 1987, to May 25, 1990, for safety violations, including hours of service, defective equipment, and driver disqualification. Clearly, regulation of these and other carriers was a proper exercise of the State's police power. During the time the regulatory fee was in place, the State of Washington had one of the better safety records in the nation, due, in part, to an exemplary inspection program by the UTC. The motor carrier safety program proved effective in reducing truck accidents as well as keeping illegal carriers from driving. The regulatory fee funded those efforts.

Finally, we ask whether alternative means could have promoted the State's legitimate interest in a regulatory safety program. Put another way, did the repealed statute place an undue burden on interstate commerce? Plaintiffs bear the burden of showing any incidental burden on interstate commerce was excessive compared to the local interest. Again, Plaintiffs have failed to provide evidence of anything more than an incidental burden on interstate commerce, and have not shown a "clearly excessive" burden. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). In fact, we are hard pressed to say that interstate commerce was even incidentally burdened. "Incidental burdens" on interstate commerce are the burdens on interstate commerce that exceed the burdens on intrastate commerce. *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415, 1425 (10th Cir.1997). There has been no proof that the

Plaintiff class of carriers, or interstate commerce, paid more for the regulatory program than did intrastate carriers.

Moreover, we note the UTC itself provided carriers with alternatives to the regulatory fee. These included floater cards, single trip regulatory fee cards, single trip permits, and lump sum regulatory fees. These options were beneficial to those interstate carriers whose vehicles were not present in Washington for significant periods of time.

The single trip permit and single trip regulatory fee card allowed carriers to forgo paying the annual regulatory fee and instead purchase such a permit or fee card at the border. Floater cards were useful for carriers operating on fixed routes, for example, from Los Angeles to Seattle. The carrier may have numerous vehicles in its fleet but not know which would be making the trip. A carrier could purchase several of the floater cards and keep them in Los Angeles to be given to a driver whose truck was dispatched to Seattle. These options, which were not available to intrastate carriers, but only to interstate carriers, could result in monetary savings to those who exercised them. That Plaintiffs chose not to use these alternatives is not evidence of a burden on interstate commerce.

Accordingly, we hold the repealed statute was a regulatory measure which did not violate the Commerce Clause. We reverse the holding of the trial court with respect to Plaintiffs' dormant Commerce Clause—or *"Scheiner"*—claim.

Neither do we find the regulatory fee was unconstitutional as a result of preemption by federal law. Plaintiffs claim the regulatory fee was preempted under 49 U.S.C. § 11506 (1978), in which Congress exercised its authority under the Commerce Clause and directed the ICC to adopt standards under which the states might require motor

carriers to prove the lawfulness of their interstate operations. The State persuasively argues otherwise.

Courts have traditionally employed a presumption against federal preemption of state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). Federal law is not preemptive of state law unless Congress has unmistakably so ordained. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Regulations purporting to preempt state authority therefore must clearly and unambiguously so intend:

> [B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means ..., we can expect that they will make their intentions clear if they intend for their regulations to be exclusive.

Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 718, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985).

There is, moreover, an additional and related judicial "'assumption that the historic police powers of the States [are] not to be superseded by ... Federal [law] unless that was the clear and manifest purpose of Congress.'" *Interstate Towing Ass'n v. City of Cincinnati*, 6 F.3d 1154, 1161 (6th Cir.1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)).

Accordingly, where, as here, the subject matter of the state statute is one within the state's traditional powers, the party arguing federal preemption must show that preemption was the "clear and manifest purpose of Congress.'" *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 206, 103 S.Ct. 1713, 1723, 75 L.Ed.2d 752 (1983) (quoting *Rice*, 331 U.S. at 230, 67 S.Ct. 1146).

The language Plaintiffs allege was preemptory is now repealed, but provided:

> The requirement of a State that a motor carrier, providing transportation ... register the certificate or permit issued to the carrier ... is not an unreasonable burden on transportation referred to in [49 U.S.C. § 10521(a)(1), (2)] when the registration is completed under standards of the Commission under subsection (c) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.

Act of October 17, 1978, Pub.L. No. 95-473, 92 Stat. 1448, § 11506(b), formerly codified at 49 U.S.C. § 11506(b).

As the State points out, on its face, this language preempted only state registration requirements regarding proof of lawfulness of interstate operations outside the ICC "standards." The statute defines standards to "mean the specification of forms and procedures required by regulations of the [ICC] to prove the lawfulness of transportation...." 49 U.S.C. § 11506(a) (1978). There is nothing in the statute which purports to preempt state regulatory authority or its corresponding power to set regulatory fees. Congress merely authorized the ICC to set uniform registration requirements and to confine states to registering interstate carriers in keeping with those requirements. The charges at issue in the repealed state statute were regulatory fees, not fees for the registration of ICC permits.

Plaintiffs also claim collection of the regulatory fee and the federal identification fee at the same time resulted in an unlawful registration requirement exceeding ICC standards. This argument is not compelling. We believe a more realistic rationale for concurrent collection of the two fees was administrative convenience and efficiency.

Finally, we note that elsewhere in the Interstate Commerce Act Congress expressly preempted state taxes with the type of unambiguous language required. 49 U.S.C. §

14502 (limiting certain taxes on motor carriers). When Congress in one part of a statute preempts state law, the implication is that other matters are not preempted. See Cipollone, 505 U.S. at 517, 112 S.Ct. 2608. We affirm the holding of the trial court with respect to Plaintiffs' preemption claim.

DURHAM, C.J., AND SMITH, GUY, JOHNSON, MADSEN AND TALMADGE, JJ., concur.

SANDERS, J., dissenting.

The majority opinion rests on the fulcrum that a "regulatory fee" cannot violate the Commerce Clause absent further proof that it discriminatorily burdens interstate commerce in practical effect. I disagree. This fee discriminatorily burdens interstate commerce on its face.

Fee For Privilege To Use Roads
Violates Commerce Clause

Fine, lawyer-like distinctions between taxes, flat taxes, user fees, and regulatory fees find no place in the text of the Commerce Clause which simply provides, "[C]ongress shall have power ... To regulate commerce ... among the several States...." U.S. Const. art. 1, § 8. The Supreme Court has summarized the purpose of the Commerce Clause to create " 'an area of trade free from interference by the States.' " *American Trucking Assocs. v. Scheiner*, 483 U.S. 266, 280, 107 S.Ct. 2829, 2838, 97 L.Ed.2d 226 (1987) (citing Boston *Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328, 97 S.Ct. 599, 606, 50 L.Ed.2d 514 (1977)). Thus, even where Congress has declined to legislate, the Supreme Court has construed the language of the Commerce Clause to prohibit the erection of state barriers to interstate commerce by negative inference, known as the dormant Commerce Clause. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995).

Whether we characterize this charge as a "tax" or a "regulatory fee" doesn't matter in and of itself—only whether its measure places a heavier burden on interstate than intrastate activities, *Scheiner*, 483 U.S. at 281-82, 107 S.Ct. 2829, thus granting a competitive advantage to local truckers at the expense of their interstate competitors. Therefore, the focus of inquiry must be whether the challenged imposition puts interstate commerce to a competitive disadvantage against local commerce.

It may be true this so-called regulatory fee is in a sense compensatory to the State for resources consumed by all fee payers; however, this particular fee is at most compensatory only in a global sense for the total cost of those programs funded by the fee, without distinction between the two subclasses of fee payers: local and interstate truckers. But it is upon that distinction which the Commerce Clause turns. Whether the characterization as a regulatory fee is meaningful for the purposes of determining if a local jurisdiction is levying a tax absent that statutory authority required by our State Constitution is, however, a different question than that posed by the Commerce Clause. Compare *Covell v. City of Seattle*, 127 Wash.2d 874, 905 P.2d 324 (1995), which held that a municipal fee for street improvements is a tax.

Under the Commerce Clause we must hypothesize the imposition of this fee to every state, to test it in one. This we call the "internal consistency" test. We need not consider the actual "adverse economic impact in dollars and cents upon a participant in interstate commerce for crossing a state boundary" to know such discrimination against interstate commerce exists. *Scheiner*, 483 U.S. at 283-84 n. 15, 107 S.Ct. 2829. See also Majority at 1240 (" 'This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue ....'") (quoting *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)).

Here, for example, we consider a $10.00 charge levied upon any truck for the privilege to operate within this State (RCW 81.80.300) plus a gross tonnage fee of up to $48.00 (RCW 81.80.320). The charge is fixed and flat regardless how many miles are driven, how many safety inspections are conducted, and, most importantly, regardless whether the

truck is engaged in wholly intrastate or interstate commerce.[1] But the latter distinction must be made for reasons stated by Justice Frankfurter, whose dissenting language in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 557, 70 S.Ct. 806, 94 L.Ed. 1053, 17 A.L.R.2d 407 (1950) (Frankfurter, J., dissenting) was relied upon by the majority in Scheiner:

> So long as a State bases its tax on a relevant measure of actual road use, obviously both interstate and intrastate carriers pay according to the facilities in fact provided by the State. But a tax levied for the privilege of using roads, and not their actual use, may, in the normal course of operations and not as a fanciful hypothesis, involve an undue burden on interstate carriers. While the privilege extended by a State is unlimited in form, and thus theoretically the same for all vehicles, whether interstate or intrastate, the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, i.e., because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier.

Capitol Greyhound Lines, 339 U.S. at 557, 70 S.Ct. 806 (Frankfurter, J., dissenting) (as quoted in *Scheiner*, 483 U.S. at 291, 107 S.Ct. 2829). In Scheiner the Supreme Court struck down Pennsylvania's flat-axle tax levied on each truck for the annual privilege of using Pennsylvania's roads. Here we have a flat $10.00 fee plus a flat tonnage fee for the annual privilege to use Washington's roads. In relevant principle

---

[1] The negative effect of the fee may be mitigated, but not eliminated, by single trip passes. The vice survives in principle as the charge is still for the privilege of using the roads, not the consumption of state resources in any quantitative sense.

they are indistinguishable, notwithstanding Pennsylvania called it a tax whereas our majority calls it a fee.

Applying this principle to our facts, the subject fee is not apportioned between "the several states" so as to insure that the interstate trucks will not pay more than the truck which is operated wholly within the boundaries of Washington if the scheme were generalized to other states. That is the constitutional problem. I disagree with the majority that a regulatory fee on the privilege to use the roads of a state need not be apportioned to survive constitutional scrutiny, at least when that fee is not based on the consumption of state resources by the actual payer of the fee.[2]

Consider, for example, the interstate trucker on a Boston to Seattle run. The total distance is 2,508 miles requiring travel through at least 11 different states. If each state charged a flat $10.00 fee for an annual road permit, plus a gross tonnage charge, the interstate trucker would pay $110.00 per

---

[2] The majority cites *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415 (10th Cir.1997) and *Interstate Towing Ass'n v. City of Cincinnati*, 6 F.3d 1154 (6th Cir.1993) for the proposition that a regulatory fee need not be apportioned; however, each distinguishes Scheiner as a case which concerns the privilege of making commercial entrances into a state. In *V-1 Oil* the court observed, "The fees involved here are not assessed 'for the privilege of making commercial entrances into' the State." *V-1 Oil Co.*, 131 F.3d at 1426 (citing *Scheiner*, 483 U.S. at 284, 107 S.Ct. 2829); whereas Interstate Towing similarly distinguished its facts from Scheiner as the fee at issue in *Interstate Towing* was "not charged for the privilege of using the City's streets...." *Interstate Towing Ass'n*, 6 F.3d at 1163. But the statute at issue here does exactly what *V-1 Oil* and *Interstate Towing* claim as the basis to distinguish Scheiner as this fee was assessed as a condition precedent to commercial entrances into Washington.

year plus eleven times his applicable gross tonnage charge to ply his trade; whereas the truck which ran an equivalent gross number of miles wholly intrastate between Seattle and Spokane would pay but $10.00 total, plus but one gross tonnage charge. Necessarily the intrastate trucker would be at a competitive advantage to his interstate counterpart because his "regulatory fee" would be less than a tenth of that required of his competitor, although the interstate trucker's use of Washington roads is considerably less. Such result discriminatorily burdens interstate commerce whether we call it a regulatory fee, a tax, or some other name.

That it also violates the Commerce Clause is not fairly debatable as "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." *Scheiner*, 483 U.S. at 284, 107 S.Ct. 2829. This conclusion necessarily holds true no matter how each of the states spends the resulting revenue. Whether the money is placed in a trust fund for highway purposes or is spent on public education, the bottom line is interstate commerce is put to a competitive disadvantage. That is precisely what the Commerce Clause was enacted to prevent.

Although the aforementioned really disposes of the Majority's argument, we might go further to distinguish how a regulatory or user fee (or tax, for that matter) might pass Commerce Clause muster. Scheiner calls this "The User- Fee Defense" and discusses it in some detail. See *Scheiner*, 483 U.S. at 289-92, 107 S.Ct. 2829. A "user fee" is the purest form of regulatory fee in that it is a fee levied to compensate the government for resources expended on a particular user's behalf. A toll bridge fee might be an example, as would an airport service fee for the passenger's use of airport facilities. See *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972). Although these fees "burden" interstate commerce,

they do not violate the Commerce Clause because, as Franks and Son, Inc., put it, "if every state assessed a transaction-based $1.00 'user fee' for each passenger boarding a commercial aircraft operating from an airport within the state, no single boarding would be subject to more than one state's fee." Appellants' Reply Br. at 15.

In the case at bar, however, the fee is for the privilege of using the roads, not the degree of actual use to which they are put. The fee is not based upon the consumption of State resources by the interstate trucker. If permitted, this fee can be multiplied as the truck crosses each state boundary without regard to the actual use of the road system "or with some other proxy for value obtained from the State." *Scheiner*, 483 U.S. at 291, 107 S.Ct. 2829. The conclusion must therefore necessarily follow that

> when the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the Complete Auto Transit [*Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977)] test that the State is imposing an undue burden on interstate commerce.

Scheiner, 483 U.S. at 291, 107 S.Ct. 2829 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 629, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981)).

In the same sense that a broken clock is right twice a day, the flat $10.00 fee, plus the gross tonnage charge, may be compensatory to the State in a given case, or in the aggregate of all such fees paid by all truckers, intrastate and interstate; however, compensatory in that sense or not, it still discriminates against interstate commerce because the interstate trucker, by definition, pays the same amount for the privilege to use the state's roads only part of the time, which the intrastate trucker pays to use the roads all of the time.

This fee cannot be distinguished from the one held unconstitutional in *Scheiner*.

Refund Is The Proper Remedy

Although the majority found it unnecessary to reach the question of remedy, because it found no constitutional violation, I conclude once the violation is established a full refund is appropriate.

Were we to call the remedy for this current application of an established principle to new facts "retroactive," then so be it as the United States Supreme Court has upheld such retroactive effect as the general rule, unless each of the following conditions to justify an exception is satisfied:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) (quoting *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) and *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969)) (citations omitted).

Clearly the ruling, as I would posit it, finds its specific source by, at least, 1987 in the Scheiner case, and a refund of every payment subsequent to that date is appropriate without necessity of further discussion.

ALEXANDER, J., concurs.

APPENDIX B

SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

Building No. 2 Courthouse
2000 Lakeridge Drive S.W. · Olympia, Washington 98502
Telephone (206) 786-5560

March 14, 1997

Mr. Jeffrey D. Goltz
Assistant Attorney General
P.O. Box 40128
Olympia, WA 98504-0128

Mr. Robert L. Browning
Attorney at Law
10777 Market Tower
10 West Market Street
Indianapolis, IN 46204

Letter Opinion

RE: *Frank & Sons, Inc., et al. v. WUTC, et al.*
Thurston County Cause No. 90-2-00495-1

Dear Counsel:

In October 1996, I determined that the State's regulatory fee to support a commercial vehicle safety inspection program was unconstitutional under the internal consistency test of the Commerce Clause of the United States Constitution. Both sides have presented extensive argument and briefing on the issue of whether Plaintiffs should be refunded fees paid under this program.

Principles of retroactivity have been addressed in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The Supreme Court set forth three factors for analysis:

1. For the decision to be applied nonretroactively (prospectively), the decision must establish a new principle of law, either by overruling clear past precedent on which litigants have relied or by deciding an issue of first impression the resolution of which was not clearly foreshadowed;

2. The court must determine whether retroactive operation will further or retard the operation of the decision; and

3. If a retroactive decision would produce substantial inequitable results, the court may order nonretroactivity to avoid the injustice or hardship.

Plaintiffs argue that the case of *American Trucking Associations,Inc. v. Scheiner*, 483 U.S. 266 (1987), hereinafter referred to as *Scheiner,* clearly foreshadowed the result in this case. Defendants argue that this result was not foreshadowed by Scheiner and that Plaintiffs, in fact, did not even argue the internal consistency test in the early proceedings in this case. I have carefully reviewed the eight volumes of pleadings and briefs in this case as well as the cases relied upon — and, in particular, the *Scheiner* case. Here is what I have found:

1. Plaintiffs' 1990 complaint alleged that the State's regulatory fee violated the Commerce Clause of the United States Constitution because it discriminated against interstate commerce in that it was a flat fee unrelated to mileage traveled in Washington and imposed a higher effective tax rate per mile on carriers traveling in interstate commerce than those solely in intrastate commerce. The complaint raised further claims related to federal preemption and 42 USC 1983. The complaint did not specifically mention the issue of internal consistency.

2. In the 1990 motion for preliminary injunction, Plaintiffs argued that to survive constitutional scrutiny, the fee must be in proportion to the taxpayer's level of activity in the

state. In supplemental briefing (See Clerk's Papers, Doc. 22), Plaintiffs also mentioned the internal consistency test, stating that flat taxes are inherently discriminatory because if each state imposed flat taxes, commerce among the states would be deterred. Scheiner was the main authority relied upon.

3. In the later 1990 motion for summary judgment, Plaintiffs raised both the internal consistency test and the fairly related test, citing *Scheiner.* (See Clerk's Papers, Doc. 47 and 70) Plaintiff cited examples applying the internal consistency test in *Goldberg v. Sweet,* 488 U.S. 252 (1988), where internal consistency was not a problem *and Container Corp. of America v. Franchise Tax Board,* 463 U.S. 169 (1983), where the court was concerned with the taxpayer's full business income only being taxed once. From these cases, Plaintiffs argued that the regulatory fee is not fairly apportioned in this case because all interstate carriers receive less than 100% of value for the fee paid, while really mixin intrastate carriers receive the fall 100% of value for the fee they pay the internal consistency discussion with the fairly related test. And, plaintiffs again argued the other theories of their case. (It is interesting to note that the State presented no discussion related to the internal consistency test, but focused entirely on discrimination and Plaintiffs' other arguments.) Plaintiff's reply (Clerk's Papers, Doc. 83) discussed the internal consistency test more fully, the fairly related test and the measure of the fee, and the discriminatory impact test, relying largely on *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), hereinafter referred to as *Complete Auto.* The State finally argued, as they have throughout, that the internal consistency test does not apply to regulatory fees, and, if it does, the administrative fee options cure the problem in this instance.

4. In Plaintiffs' 1996 second motion for summary judgment, the arguments remained the same, although discovery produced factual information requested by the court

on the discrimination claim. Plaintiffs argued both the internal consistency test and the factual discrimination issue.

5. Summary judgment was denied both parties in March 1991. Neither did anything to move this matter forward to an early trial. The legislature abolished the regulatory fee in 1993. Finally, in the summer of 1996, five years after the first summary judgment hearing, the parties brought this matter back for a second motion for summary judgment.

From this review, I conclude that the internal consistency argument was not part of the Plaintiffs' complaint, but by the time of the first summary judgment motion's hearing, the internal consistency argument was at issue.

I have reviewed the cases cited throughout these proceedings to determine whether the internal consistency test was available as guiding precedent at the outset of this case, independent of issues related to discrimination in fact.

The *Complete Auto* case, supra, (1977), had four prongs for analysis. To survive scrutiny under the Commerce Clause of the United States Constitution, the Court announced that a tax must:

1. Be applied to an activity with a substantial connection to the state;
2. Be fairly apportioned;
3. Not discriminate against interstate commerce; and
4. Be fairly related to the benefits provided the taxpayer by the state.

Although these four tests have been cited for over a decade for what the *Complete Auto* case stood for, there was little or no discussion of each test in the *Complete Auto* case itself. The commentary has come with the progeny.

Looking back at *Scheiner* which was decided in 1987, I now agree that the internal consistency test was discussed in that case separate and apart from the factual discrimination issues. However, it cannot be overlooked that there was factual discrimination in *Scheiner*. Interstate carriers based outside Pennsylvania paid more per mile for the privilege of traveling in Pennsylvania than intrastate carriers. And, the focus of the opinion in *Scheiner* was on the discrimination analysis. The fact that the *Scheiner* case included factual discrimination and internal consistency problems distinguishes it from the instant case. No discrimination in fact has been demonstrated here.

Plaintiffs consistently cited *Goldberg v. Sweet,* supra, (1988), which discussed the second prong of the *Complete Auto* test. There, it was again recognized that the central purpose behind the apportionment requirement is to ensure that each State taxes only its a fair share of an interstate transaction. *Goldberg, supra* at 261. "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg, supra* at 26 1. The tax in *Goldberg was* only on interstate phone calls charged to an in-state service address for which there could be no multiple taxation if other states adopted an identical tax. "The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg, supra* at 262. The Court concluded that the risk of multiple taxation was low, actual multiple taxation was precluded by a credit provision, and there was no feasible alternative for apportionment. All of this analysis was independent of the discrimination analysis and fairly related prongs of the *Complete Auto* test which were also discussed. The case was not decided on the basis of the internal consistency test.

A new case that had been decided by the time of the second summary judgment motions was *Oklahoma Tax Commission v. Jefferson Lines,* 514 U.S. ---, 131 L.Ed.2d 261, 115 S.Ct. 1331 (1995), hereinafter referred to as *Jefferson Lines.* There, the United States Supreme Court clearly distinguished between the internal consistency test and the external consistency test as related to the fair apportionment prong of the *Complete Auto* test. The Court recognized that for a decade the fair apportionment issues had been assessed by asking whether the tax is internally consistent and externally consistent. The court stated:

"Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every other State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Jefferson Lines, supra* at 271.

"External consistency, on the other hand, looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activities within the taxing State." *Jefferson Lines, supra* at 272.

Jefferson Lines, supra, made clear that to pass the fair apportionment prong of the *Complete Auto* test, both the internal consistency and external consistency tests had to be met. The court considered fully the fair apportionment issue and found the tax fair because no identical tax could be imposed by other states.

By the time of the 1996 summary judgment motion, the fair, apportionment issues had been applied to user fee

analysis as well as excise tax analysis. The state court cases I relied on in particular for my October 1996 decision were *American Trucking Associations, Inc., v. Sec. of Administration,* 415 Mass. 337, 613 N.E. 95 (1993), involving a hazardous waste transporter fee, and *American Trucking Associations, Inc., v. State of Wisconsin*, 1996 WL 384533 (Wis.App. 1996), also involving a fee for hazardous waste transportation.

Although case law with respect to the internal consistency and external consistency principles of fair apportionment has not changed since the parties' initial hearings in 1990, none of the cases relied on in the 1990 hearings invalidated a tax or fee based on the internal consistency analysis alone. If *Scheiner's* application to his case had been clear, I can only believe Plaintiffs would have vigorously pushed this case to conclusion in this trial court and in the appellate forums. The delay suggests that the outcome may not have been clear to Plaintiffs, just as it was not clear to me. I do not find that the *Scheiner* decision clearly foreshadowed the result in this instance.

The next principle of the Chevron analysis is that of whether retroactive application furthers or retards the application of the court's ruling. Of course, I have declared unconstitutional, a statute that was repealed over three years ago. The issue was not moot because of the Plaintiffs' request for refunds. Retroactive relief, however, would not aid in the operation of the decision declaring the statute unconstitutional. The statute has not been in force, and the regulatory fee has not been collected, for three years.

Finally, the question is one of whether substantial inequitable results would follow from a retroactive application of the decision. Any regulatory fees collected by defendant have long ago been spent on the inspection program. Defendants collected the fees from 1990 to 1993 with the court's implicit approval (injunctive and summary judgment

relief had been denied). Plaintiffs do not claim to have paid inspection fees to other states (there were no other identical taxes). Plaintiffs have also not demonstrated that fees paid are, in fact, disproportionate to the benefit/burden of their presence in Washington or are discriminatory. (I earlier determined that mileage traveled has not been demonstrated be the measure of value of this regulatory program.) The regulatory fee was declared unconstitutional because of its potential burden on interstate commerce. No actual multiple burdens occurred. A nonretroactive application of the decision in this matter has not discriminated against Plaintiffs in interstate commerce and would avoid substantial hardship on the State.

Plaintiffs rely on *McKesson* Corp v. *Division ofAlcoholic Beverages and Tobacco,* 496 U.S. 18 (1990), to argue due process requires refunds. Defendant argues that the due process requirement of a pre-deprivation remedy announced in *McKesson* was available to Plaintiffs through administrative appeal or the courts. Plaintiffs in fact availed themselves of the injunctive relief process in this court. And, I agree with Defendant that the fact that the injunctive relief was denied does not negate the availability of a predeprivation process as required by due process. Finding due process requirements met, I have used the *Chevron Oil* test to analyze whether retroactive relief should be ordered.

The request for retroactive refund relief is denied.

Yours very truly,

/s/ PAUL CASEY

Paula Casey
Judge

PC:bvm
Court File

SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

Building No. 2 Courthouse
2000 Lakeridge Drive S.W. · Olympia, Washington 98502
Telephone (206) 786-5560

October 28, 1996

Mr. Jeffery D. Goltz
Asistant Attorney General
P.O. Box 40128
Olympia, WA 98504-0128

Mr. Robert L. Browning
Attorney at Law
1777 Market Tower
10 West Market Street
Indianapolis, TN 46204

Letter Opinion

RE: *Frank & Sons, Inc., et al. v. WUTC, et al.*
Thurston County Cause No. 90-2-00495-1

Dear Counsel:

Both parties have again moved for summary judgement on the issue of the constitutionality of RCW 81.80.320. Since the initiation of this lawsuit and since the court's last ruling in the matter in 1991, RCW 81.80.320 has been repealed. The issues before the court are not moot, however, because Plaintiffs seek retroactive relief should the statute be declared unconstitutional.

I am satisfied that for RCW 81.80.320 to pass Commerce Clause constitutional scrutiny, the regulatory fee must not have be discriminatory with respect to interstate commerce, must have imposed no greater burden on Plaintiff's than was a fair approximation of the privilege granted (or the burden on

the state), and must not have the potential for multiple burdens on interstate carriers. The fee at issue here is based on gross weight of intrastate and interstate carriers, including those interstate carriers based in and out of Washington. Plaintiff's class is all interstate carriers traveling in Washington.

Discrimination. RCW 81.80.320 on its face does not discriminate between intrastate and interstate carriers. The regulatory fee is imposed on both. Plaintiffs' discrimination claim is based on their analysis that interstate carriers, generally, travel fewer miles per year in Washington than intrastate carriers and therefore pay more per mile for the safety inspection program than intrastate carriers. Plaintiffs further allege that the burden placed on Washington, out of which the safety inspection program arises, is directly related to miles traveled by each carrier.

Based on the Plaintiff's Affidavit of Robert Browning and Defendant's Second Affidavit of David Pollnow, there is a factual dispute about the actual differences in fee paid per mile traveled for interstate and intrastate carriers. More significant, however, is the parties' dispute as to whether mileage is a fair measure of the safety burden carriers place on Washington.

When this issue was presented to me in 1991, I did not decide it because of the absence of factual support for the proposition of whether interstate carriers were paying more per mile than intrastate carriers. However, I did assume, at page 4 of my March 4, 1991, letter decision, that a lesser presence in the state (fewer miles traveled) would be directly related to lesser burdens for safety regulation within the state. In American Trucking Ass'n v. Scheiner, 483 U.S. 266 (1987), miles traveled was a reasonable measure of the burdens for which the fee was intended to compensate (highway wear and tear). For purposes of a discrimination analysis, the regulatory fee must be considered in relation to

that which is a fair measure of the benefit conferred or burden borne.

After considering the materials for the renewed motions, I am not satisfied that mileage is a fair measure as Plaintiffs urge. Defendant's argument and supporting materials, including the Sixth Affidavit of Don Lewis, suggest that highway safety has unique burdens imposed by interstate carriers. Defendants claim that long distance carriers have more safety problems because they spend more time away from home base where maintenance of vehicles takes place, interstate carriers are generally larger than intrastate carriers and are more time consuming and difficult to inspect, interstate carrier drivers are more likely to exceed allowable driving hours than intrastate carrier drivers because of the nature of longer hauls, and interstate carriers are issued citations for safety violations much more often than intrastate carriers. These factual claims are not refuted by Plaintiffs.

Accordingly, I find Plaintiffs' concerns for the disparity of costs per mile to interstate and intrastate carriers does not mean that this regulatory fee discriminates against interstate commerce. There would have to be a relationship between miles and costs for the analysis to be meaningful. Plaintiff's have not proven such a relationship and have not proven discrimination in fact.

Internal Consistency. Of course, the Commerce Clause analysis does not end here. The next question is that of internal consistency. In my earlier decisions, I announced that the regulatory fees in this matter should not be distinguished from a tax for purposes of Commerce Clause analysis. The regulatory fee is exacted for the privilege of entering and using highways in Washington, much like the fees charged users for highway maintenance in American Trucking Assn., v. Scheiner, *supra*. It is still my opinion that the safety inspection program should not be analyzed differently because it arises from the state's police power rather than the state's

taxing authority. American Trucking Ass'n v. Secretary of Admin, 415 Mass 337, 613 N.E.2d. 95 (1993), specifically held that the internal consistency test applies to user fees for regulation of the transportation of hazardous materials. I agree with this state court ruling and its applicability to the regulatory fees in this case.

A regulatory fee must be reasonably related to a fair approximation of the benefit received or burden imposed and be such that if applied by every jurisdiction, there would be no interference with free trade. In this case, it is undisputed that the total of fees charged approximated the total cost incurred in administration of the safety inspection program. The fees authorized were based on gross weight of carriers and ranged from $7 to $48. The highest fee charged was $34. What is not answered is whether the cost of the safety program was reasonable in relation to the burden placed on interstate carriers who, with intrastate carriers, were required to pay for it.

Also, neither party's argument focuses on whether gross weight is an appropriate measure of differentiating charges among carriers, in order to fairly allocate benefits or burdens. Defendant's supporting materials show that larger carriers are generally found in interstate commerce where the greater safety regulation burden has been demonstrated. This alone is weak support for the idea that gross weight bears some relationship to the burden on the state from particular carriers regulated by the safety inspection program.

What is also apparent is that problems of highway safety requiring a safety inspection program in Washington are problems common to all states. All states could duplicate this fee on interstate carriers because the safety issues within their boundaries are similarly implicated. Accordingly, there is a potential for multiple burdens. The administrative alternatives do not save the regulatory fee. They simply vary the amount

of the fee with no more apparent direct proportional relationship to the burden than the basic annual fee itself.

Despite Commerce Clause implications, courts are allowed to examine whether a fee structure is the only alternative means of collecting for the burden on the state. Defendants in this case have not argued that there is no other alternative. Plaintiffs offer that the state has alternative taxing authority for interstate carriers in Washington as a source of revenue for highway programs, including safety.

Based on the foregoing discussion, I find that RCW 81.80.320 did not satisfy the internal consistency test of the Commerce Clause analysis. Therefore, the statute was unconstitutional.

Refund. Plaintiffs request retroactive application of this ruling. Having determined the statute unconstitutional and recognizing the significance of the large dollar amounts at stake for all parties, I would like to give counsel another opportunity to present arguments regarding the issue of refund. Please confer with each other and Judy Foster or Debbie Requa in the court's calendaring department to determine when further argument will be presented on the refund issue.

Very truly yours,

/s/ PAULA CASEY

Paula Casey
Judge

PC:bam

cc: Court File
Ms. Susan G. Loitz
Mr. Howard A. Coleman

SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

Building No. 2 Courthouse
Olympia, Washington 98502

2000 Lakeridge Drive S.W.
Telephone (206) 786-5560

March 8, 1991

Jeffrey D. Goltz
Assistant Attorney General
1400 S. Evergreen Park Drive SW
MS: FY-11
Olympia, WA 98504

James H. Hanson
Scopelitis, Garvin, Light & Hanson
1777 Market Tower
10 West Market Street
Indianapolis, IN 46204

Re: FRANK & SONS, INC. ET AL., V. STATE OF WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, ET AL.,
Thurston County Cause No. 90-2-00495-1

Dear Counsel:

This case arises with Plaintiff's challenge to the annual regulatory fee imposed by RCW 81.80.320. Plaintiffs are interstate carriers that conduct business in Washington.

By previous oral ruling I declared that federal law does not also pre-empt the state's regulation and fee assessment. I also declared the state's argument distinguishing this fee from a tax fails under Commerce Clause analysis. I continue to hold those opinions and will not discuss them further here.

The remaining issue is whether Plaintiffs have proven that the regulatory fee, together with single trip permits available under RCW 81.80.318 and administrative options available

under WAC 480-112-130, exacted for the primary purpose of supporting a motor carrier safety inspection program violates the Commerce Clause of the United States Constitution. The regulatory fee is a lump sum annual fee based on gross weight of the vehicle.

American Trucking Association., Inc. v. *Scheiner*, 483 U.S. 266 (1987) is valuable precedent for this case. In *Scheiner*, the United States Supreme Court declared Pennsylvania's "flat" highway use taxes assessed against interstate carriers unconstitutional. A challenge had been brought to motor carrier fees assessed under two separate laws, In 1980 a $25 per vehicle marker fee was assessed against motor vehicle carriers except those registered in Pennsylvania. The Pennsylvania vehicles were subject to registration fees that the statute declared were deemed to include a marker fee. In 1982, Pennsylvania reduced its marker fee to $5 per vehicle, which the parties agreed was the cost of issuing the marker, and began assessing an annual axle tax of $36 per vehicle axle. Vehicles traveling less than 2,000 miles in Pennsylvania were entitled to a pro-rated rebate on the axle tax. Although the axle tax applied to in-state and out-of-state based vehicles, the registration fee paid by in-state vehicles was reduced by the same amount as the axle tax imposed.

Interstate motor carriers argued that both schemes imposed taxes only on carriers registered outside Pennsylvania.

The Supreme Court held that "[t]he way in which a tax levied on participants in interstate commerce in measured and assessed bears directly on whether it implicates central Commerce Clause values." *Id.* at 282. The Court stated that unapportioned flat taxes may disrupt free trade by putting pressure on businesses to ply their trade solely within the taxing state or suffer the penalty of possible cumulative taxes. "To pass the 'internal consistency' test, a state tax must be of

a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Id.* at 284. Pennsylvania's flat tax did not pass the internal consistency test because of the threat to free trade among the states.

Based on evidence presented, the Court also found Pennsylvania's flat tax subjected out-of-state vehicles to higher charges per mile than in-state vehicles and the charges did not fairly approximate the cost or value of using Pennsylvania roads. The tax therefore was not fairly related to the taxpayer's presence or activities within the state.

The Supreme Court did acknowledge that there are instances in which flat taxes would be constitutional, such as where there are no other practicable means of collecting revenues from users and a more finely graduated user fee would pose genuine administrative burdens. *Id.* at 296. This justification was not available to Pennsylvania because the state already used mileage based figures to apportion other fees for motor carriers.

When Plaintiffs in this case sought temporary relief, the state argued, and I agreed that those challenging the regulatory fee through commerce clause analysis have the burden of proving factual unfairness of the tax burden's affect on interstate commerce. Basically, Plaintiffs still have offered no admissible evidence on the issue. Nor has the state provided evidence to disprove Plaintiffs' promise. The state's evidence shows that the total amount of regulatory fees collected under the challenged provision reasonably approximates Washington's total cost of supervising and regulating motor carriers for safety purposes. What the evidence does not show is how the program or its charge relate to any carriers presence in the state.

One premise seems obvious, absent proof to the contrary: that vehicles travelling in interstate commerce necessarily do some of their business and travel outside the State of

Washington. Their lesser presence in the state seems logically and directly related to lesser burdens of the state for safety regulation. These assumptions, however, are not a sufficient basis for me to conclude whether the regulatory fee is fairly related to a carrier's presence in the state. Consequently, I deny both parties' notions for summary judgment and again request that discovery be continued so the court may be provided with a factual basis for its decision.

It may be argued by Plaintiffs that such factual support is not needed for the court's ruling on the question of internal consistency. The Washington fee challenged is a flat tax. If a similar fee were applied by every other state, only those carriers doing solely intrastate business would avoid cumulative tax burdens. Interstate business could be deterred or impeded by this consequence. The internal consistency test does not appear to be met by the challenged fee. However, it is my opinion that if there is fair apportionment of taxes based on the amount of contact with Washington, the internal consistency requirement may be satisfied.

Because it has been previously requested and not provided, wonder about the availability of statistical evidence. In its absence, it is important to know how the safety regulatory program works. What carriers are inspected where, with what frequency? Why is the particular scheme used? From this type of program operational information, it should be possible to determine whether the fee is fairly related to the taxpayer's presence in the state.

This matter should be met for trial unless the parties agree to present further factual information by affidavit.

Very truly yours,

/s/ PAULA CASEY
Paula Casey
Judge

IN THE
SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

FRANKS & SON, INC., AND COAST EXPRESS, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,	)	
Plaintiffs,	)	
vs.	)	No. 90-2-00495-1
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; AND OFFICE OF THE STATE TREASURER,	)	REPORTER'S TRANSCRIPT
Defendants.	)	

VERBATIM REPORT OF PROCEEDINGS

BEFORE: THE HONORABLE PAULA CASEY, JUDGE

BE IT REMEMBERED that this matter came on regularly for ORAL OPINION OF THE COURT before the Court in the courtroom of the Thurston County Courthouse in Olympia, Washington, on July 6, 1990.

APPEARANCES

For the Plaintiffs: JAMES E. DAVENPORT
Attorney at Law
Riddell, Williams, Bullitt & Nalkinshaw
Suite 4400, 1001 Fourth Avenue Plaza
Seattle, Washington 98154

For the Defendants: JEFFREY D. GOLTZ
Assistant Attorney General
Utilities & Transportation Commission
1400 S. Evergreen Park Drive S.W.
Olympia, Washington 98504.

OLYMPIA, WASHINGTON, FRIDAY, JULY 6, 1990

MORNING SESSION

—00000—

THE COURT: Good morning. I'm sorry to have canceled our last meeting in this matter, but I'm glad you were able to come today.

This is the matter of Franks & Son v. State of Washington, Utilities and Transportation Commission. We are here for a ruling on the preliminary injunction issues that were argued about a month ago.

I notice that Mr. Goltz had some preliminary motions to strike supplemental briefing. I'm sure, Mr. Goltz, that you would like to address those. Technically, I will agree that the additional briefing was not actually authorized by the court or timely. Because my decision is not going to be predicated an the briefing, I don't think that the State has been prejudiced, and the briefs will remain in the court record.

MR. GOLTZ: Your Honor, then I'm not even going to address it. It's obviously not pivotal, and my reading of the

brief doesn't persuade me if it doesn't persuade you. I just wanted to basically send a signal to — not to Mr. Davenport — but to out-of-state counsel that, you know, I view that as inappropriate, and I just want to send a signal. And I hope in the future, as this litigation proceeds, we'll be able to reach a clear understanding, an arrangement for such briefs.

THE COURT: Anything else preliminary to the ruling that needs to be addressed?

I'll begin by saying that I have dealt with other taxing issues, as counsel is well aware, and taxing issues are often difficult and challenging ones. I find that the issue raised on this request for injunctive relief is a pretty close question. Counsel should recognize that and will recognize that by the nature of my ruling.

This matter, of course, comes before the court on the trucking company's motion. There has been a motion to certify a class that has been filed but it has not yet been argued, and the class has not yet been certified. Currently there are a couple of named trucking companies as plaintiffs that currently bring that action.

The present motion is for preliminary injunctive relief requiring the State to place proceeds from a regulatory fee collected pursuant to RCW 81.80.320 in escrow pending a decision on the merits of this action. Basically as you're well aware, the plaintiffs allege that the fee collected pursuant to that statute is an unconstitutional tax in violation of the Commerce Clause. The plaintiffs rely heavily on the Supreme Court's analysis of the *American States Trucking Association* v. *Scheiner* case and cases that have followed.

In resisting the plaintiff's constitutional challenge, the State has argued that this is a regulatory fee, not a tax, and that the State has authority to regulate for public safety. While I certainly agree that the State has authority to regulate for public safety, I believe that any regulation involving

imposition of a tax-like fee is subject to the same scrutiny under the Commerce Clause as taxes are. The regulatory scheme cannot burden interstate commerce more than Intrastate commerce.

The State also argues that this case is unlike the *Scheiner* case. In *Scheiner*, of course, taxes were collected for highway construction and repair, which is necessarily correlated with the number of miles traveled. The regulatory fees at issue here fund various programs, including a vehicle safety inspection program. Although these inspections and the safety issues may well be directly related to miles traveled, as in the *Scheiner* case, this correlation has not at this juncture been established by the evidence.

In fact, there is no evidence before the court as to what the correlation is between this inspection scheme and the tax collected. In fact, there is a lack of evidence explaining exactly how that safety inspection program works. There is no evidence to indicate whether the number of inspections are related to miles traveled. It is agreed that motor carrier checkpoints or weigh stations are located throughout the State, not simply at points of entry.

There is no evidence to indicate how the rate of inspection has been determined or its relationship to highway safety. There is no evidence on the question of whether the fees charged per vehicle are related to the cost of inspection per vehicle.

Now, if these issues are established In plaintiff's favor, and they very well may be when the evidence is examined, the State will still have an opportunity to show that this is the only practical means of collecting revenue to fund a safety program. If we get that far, it seems very possible and likely that the State will be unable to meet the burden of justifying a flat tax.

But again, I think that the plaintiff does have the burden to go forth in producing evidence to show the discriminatory nature of the tax. The State does have the opportunity to attempt to justify the flat tax and, without that evidence, the court cannot determine that the plaintiffs are likely to prevail on the merits.

The posture of the case today precludes pre-judgment of these issues in the absence of specific evidence on how the regulatory system works. As I read the *Scheiner* case, flat taxes or fees are rarely appropriate, but the plaintiff must be put to its burden of proof before this scheme can actually be declared to be unconstitutional.

Also, because the escrowing of proceeds from this tax would have significant impact on the safety inspection program, I think that the court needs to proceed with some caution. I believe that caution dictates denying the plaintiff's request for injunctive relief on constitutional grounds at this time.

In addition to the constitutional argument, the plaintiffs have argued that federal preemption limits the State's authority to collect more than $10 per vehicle, which is the federal limit authorized for carrier identification stamps.

I am not convinced that Congress has preempted the State's authority to charge a regulatory fee for its safety program and assessing it at the time of registration. In appears that the ICC regulations promulgated pursuant to federal law actually declares that states may impose additional fees for other purposes, other than the simple posting of the identification stamps within vehicles. It is my belief that the plaintiffs are not likely to prevail on the federal preemption issue.

Again, although I am denying the plaintiffs their injunctive relief today, it seems likely that the plaintiffs may ultimately prevail on this issue once the evidence is presented,

since flat taxes are appropriate only in rare instances. Certainly I would recommend that discovery proceed and that the parties address resolution of this issue and the State address whether this policy is the most appropriate policy for funding its inspection program.

It's my understanding that unless they bring more vehicles into the state, the plaintiffs will not actually be faced with paying for more fees related to this inspection process until next January. It is also my understanding that we currently have trial dates available before next January. It seems to me that the best solution to this current problem, to avoid payment of taxes that are questionably refundable if this law is ultimately declared to be unconstitutional, is to have the trial as early as possible.

Now, I don't know if counsel are aware, but the court has recently adopted a new process for trial settings which requires filing a certificate of readiness after the completion of discovery. Under the new rule, a trial date is not assigned until that certificate of readiness is filed. But because of the importance, in my opinion, of resolving these constitutional issues before significantly more taxes are collected, I am going to authorize the waiver of the certificate of readiness procedure in this case and allow a trial date to be assigned as soon as an answer is filed.

I'm not sure if there is an answer in the file at this time?

MR. GOLTZ: There is not, Your Honor.

THE COURT: Because I know that the plaintiffs also are eager to proceed. I'm sure an answer is due by now; is that right?

MR. GOLTZ: It's overdue by a few days.

THE COURT: I'm going to require that the answer actually be filed by next Friday so that the parties can proceed to obtain a trial date.

MR. GOLTZ: That's fine, Your Honor.

MR. DAVENPORT: Your Honor, the plaintiffs have filed a motion to determine the propriety of the class action, and I'd like Your Honor's advice or counsel about how you would prefer us to proceed on that. May we note that matter back before Your Honor, or should we take that back on the motion calendar; and given the trial matter that you've brought up, what timing would you like us to have that matter considered?

THE COURT: This is a case that I think should be pre-assigned, and I'm actually going to suggest to the Calendar Administrator that this case be pre-assigned to me because of the time that I have spent just dealing with the *Scheiner* analysis.

With respect to the motion for class certification, that can be rescheduled in front of me at any time at an 8:45 hearing, but I'm wondering if there's actually going to be opposition to the class certification.

MR. GOLTZ: As the motion stands, there will be, Your Honor. As a matter of fact, on Monday we will be sending out some — I hope on Monday — some limited discovery which will include in that some issues relevant to the class certification. And so as soon as the responses to those particular questions are received, then it can be — we can file our responsive brief and it can be argued, as far as I'm concerned.

MR. DAVENPORT: We'd just like to have it considered as soon as possible, giving the State the opportunity to respond in an appropriate way.

MR. GOLTZ: Would it be useful for us to check with Ms. Foster about an 8:45 date?

THE COURT: Sure, she's the one that actually schedules the dates at your convenience. While you're both here today, I would suggest you speak with her about potential trial dates.

(Discussion off the record.)

MR. DAVENPORT: If I may, for a point of clarification, is your ruling here today based on a finding that the plaintiffs are likely to prevail on the matter of the flat tax violating the Commerce Clause, or that they are not likely to prevail?

THE COURT: Today I cannot find that plaintiffs are likely to prevail because I don't have the evidence from which to conclude that they are. It is my belief that the plaintiffs may well be able to produce evidence to prevail, but the evidence as to how this inspection fee and the inspection system work relative to interstate and intrastate carriers is simply not in the record.

If I would find there is a likelihood of prevailing to the merits, of course, I would grant the injunction. Based on the evidence we have today, there's a lack of evidence for reaching that-conclusion.

MR. DAVENPORT: Then as to the federal preemption issue, you've also found that it is not likely that they will prevail — the plaintiffs will prevail; is that correct?

THE COURT: Definitely. That is not due to an evidentiary problem, but my belief and finding that the federal law does not preempt the state's imposition of inspection fees in addition to the identification fee at the time of registration.

MR. GOLTZ: We'll prepare an order.

THE COURT: Okay.

MR. DAVENPORT: Thank you, Your Honor.

MR. GOLTZ: Thank you, Your Honor.

(Proceedings concluded.)

IN THE
SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

FRANKS & SON, INC., and COAST EXPRESS, INC.,	)	
Plaintiffs,	)	NO. 90-2-00495-1
vs.	)	ORDER DENYING MOTION OF PLAINTIFF CARRIERS FOR PRELIMINARY INJUNCTION ESCROWING REGULATORY FEE PROCEEDS
STATE OF WASHINGTON; WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; AND OFFICE OF THE STATE TREASURE,	)	
Defendants.	)	

This matter came before the Court upon the motion of plaintiffs, Franks & Son, Inc., and Coast Express, Inc., for a preliminary injunction seeking an order requiring the state defendants to place in escrow all unexpended regulatory fees paid pursuant to RCW 81.80.320 pending the outcome of this litigation. After considering the briefs and records in this case, having heard oral argument on June 7, 1990, having received and reviewed supplemental memoranda, and having rendered an oral opinion on July 6, 1990, the Court makes Findings of Fact and Conclusions of Law as set forth in the Court's Oral Opinion, a copy of which is attached hereto.

Based on those Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED: KENNETH O. EIKENBERRY.
ATTORNEY GENERAL

_____
Assistant Attorney General

1400 S. Evergreen Park
Drive SW
Mail Stop: FY-11
Olympia. Wa. (206)
98504 Telephone

Order Denying Mot.
for Prelim. Injunction

1. Plaintiffs' Motion for a Preliminary Injunction Requiring the Escrowing of Regulatory Fee Proceeds is denied.

2. State Defendants' Motion to Strike the Plaintiffs Reply to the State's Supplemental Memorandum is denied.

3. The parties may seek and obtain a trial date from the calendar administrator without the filing of a certificate of readiness as required by local rules.

4. This case is assigned to the undersigned Judge.

DATED this [27th] day of September, 1990.

/s/ PAULA CASEY
JUDGE

Presented by:

KENNETH O. EIKENBERRY

/s/ JEFFREY D. GOLTZ
JEFFREY D. GOLTZ
Assistant Attorney General
Attorney for State Defendants

Copy received; Notice of
presentation waived:

/s/ JAMES H. DAVENPORT
JAMES H. DAVENPORT
Attorney for Plaintiffs

Supreme Court, U.S.
FILED
MAR 12 1999
OFFICE OF THE CLERK

NO. 98-1282

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

FRANKS & SON, INC., on behalf of themselves and all others similarly situated,

Petitioners,

v.

THE STATE OF WASHINGTON, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, AND OFFICE OF THE STATE TREASURER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General
JEFFREY D. GOLTZ*
WILLIAM BERGGREN COLLINS
Senior Assistant Attorneys General
Counsel for Respondents
*Counsel of Record
P.O. Box 40128
Olympia, WA 98504
(360) 664-1186

NO. 98-1282

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

FRANKS & SON, INC., on behalf of themselves and all others similarly situated,

Petitioners,

v.

THE STATE OF WASHINGTON, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, AND OFFICE OF THE STATE TREASURER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General
JEFFREY D. GOLTZ*
WILLIAM BERGGREN COLLINS
Senior Assistant Attorneys General
Counsel for Respondents
*Counsel of Record
P.O. Box 40128
Olympia, WA 98504
(360) 664-1186

QUESTION PRESENTED

Whether a state regulatory fee charged to motor carriers violates the Commerce Clause when the fee (1) is used only for regulating such carriers, (2) is based on a fair approximation of the costs to the state of such regulation, and (3) does not discriminate against interstate commerce.

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT 2

A. The Nature and Purpose of the Regulatory Fee 2
B. Procedure Below 6

REASONS WHY THE PETITION SHOULD BE DENIED 9

A. The Challenged Regulatory Fee Is Not a "Tax" 9
B. The Decision Below is Consistent with Prior Decisions of This Court 11
C. The Decision Below Is Consistent with the Great Majority of Lower Court Decisions 18
D. The Constitutional Issue Raised by the Now Repealed Washington Regulatory Fee Is Not So Significant as to Warrant Review in this Case 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases Page

Aloha Freightways, Inc. v. Commissioner of Revenue,
428 Mass. 418, 701 N.E.2d 961 (1998) 15, 19

American Trucking Ass'ns v. Scheiner,
483 U.S. 266 (1987) ..... *passim*

American Trucking Ass'ns, Inc. v. Secretary of Administration,
613 N.E.2d 95 (Mass. 1993) 18, 19

American Trucking Ass'ns, Inc. v. Secretary of State,
595 A.2d 1014 (Me. 1991) 18

American Trucking Ass'ns, Inc. v. Wisconsin,
205 Wis.2d 489, 556 N.W.2d 761 (Wis. App.),
rev. denied, 207 Wis.2d 287, 560 N.W.2d 274
(1996) 18

Center for Auto Safety, Inc. v. Athey,
37 F.3d 139 (4th Cir. 1994) 18

Clyde Mallory Lines v. Alabama,
296 U.S. 261 (1935) 12

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1981) 14, 17

Complete Auto Transit v. Brady,
430 U.S. 274 (1977) 8, 9, 12, 17

Cooley v. Board of Wardens,
12 How. (53 U.S.) 299 (1857) 10

Dean Milk Co. v. City of Madison,
340 U.S. 349 (1951).....11, 12

Department of Banking & Finance v. Credicorp, Inc.,
684 So.2d 746 (Fla. 1996).....18

Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines,
406 U.S. 707 (1972).....13, 14 17, 18

Exxon Corp. v. Governor of Maryland,
437 U.S. 117 (1978).....15

Great Northern Ry. Co. v. Washington,
300 U.S. 154 (1937).....11

Government Suppliers Consolidating Servs., Inc. v. Bayh,
975 F.2d 1267 (7th Cir. 1992), *cert. denied*,
506 U.S. 1053 (1993).....18, 19, 20

Head Money Cases,
112 U.S. 580 (1994).....10

Interstate Towing Ass'n v. Cincinnati,
6 F.3d 1154 (6th Cir. 1993) 18

Massachussets v. United States,
435 U.S. 444 (1978).....10

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,
496 U.S. 18 (1990).....21, 22

Morgan's Louisiana and Texas Railroad & Steamship Co.,
118 U.S. 455 (1886).....12

National Cable Television Ass'n v. United States,
415 U.S. 336 (1974).....10

Northwest Airlines v. County of Kent,
510 U.S. 355 (1994).....13, 17

Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995).....12, 13, 14

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970).....9, 15, 16

Seibert v. Clark,
619 A.2d 1108 (R.I. 1993).....18

Sprout v. City of South Bend,
277 U.S. 163 (1928).....12, 14, 17

Trailer Marine Transport Corp. v. Rivera Vazquez,
977 F.2d 1 (1st Cir. 1992).....15

United States v. Sperry Corp.,
493 U.S. 52 (1989).....10, 14

United States v. United States Shoe Corp.,
523 U.S. ____, 140 L.Ed.2d 453 (1998).....10

V-1 Oil Co. v. Utah State Dept. of Pub. Safety,
131 F.3d 1414 (10th Cir. 1997).....18

Statutes & Regulations

42 U.S.C. § 1983 7

49 U.S.C. § 11506 7

49 U.S.C. § 14502 16

49 U.S.C. § 14504 7

Wash. Admin. Code §§ 480-12-165 to 190 (1977) 2

Wash. Admin. Code § 480-12-180(6) 2

Wash. Rev. Code § 80.80.318 (1993) 5

Wash. Rev. Code § 81.80.300 (1993) 4

Wash. Rev. Code § 81.80.320 (1993) 1, 5

Wash. Laws 1985, chapter 7, § 153 5

Wash. Laws 1993, chapter 97, § 7 1

INTRODUCTION

The Petitioner asks this Court to declare unconstitutional as violative of the Commerce Clause a Washington regulatory fee which was repealed in 1993.[1] The proceeds of that fee were used by the Washington Utilities and Transportation Commission (WUTC or Commission) only in its motor carrier regulatory program, primarily for the enforcement of state and federal safety regulations. Because the fee was not discriminatory and was based on a fair approximation of the services provided by the state, it is valid, and the Court should deny the Petition for a Writ of Certiorari (Petition). The judgment below is not inconsistent with existing Supreme Court case law; there is no substantial split of authority on the question presented in state supreme courts and federal courts of appeal; and, in any event, the issue presented is not a substantial one warranting review by this Court in the context of this case.

---

[1] The regulatory fee at issue in this case was imposed by former Wash. Rev. Code § 81.80.320 (1993), Wash. Laws 1971, ex. sess., ch. 143, §5, which is reproduced in the Appendix at 1a-2a. It was repealed effective January 1, 1994. Wash. Laws 1993, chapter 97, § 7. It was repealed because of the enactment of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991). That Act authorized the then Interstate Commerce Commission to create a base state registration system for interstate carriers and allowed each state to impose a fee in lieu of a registration fee, not to exceed that amount earlier charged (in Washington's case, $10). That fee was collected by the carriers' base state and then transmitted to each state actually imposing such registration fees. The Congressional decision that each state could not register all carriers doing business in that state made it administratively difficult to impose any additional regulatory fee over and above the base state fee. This led to a revised funding method, relying more on fees from intrastate carriers. *See Franks & Son, Inc. v. State*, 136 Wn.2d 737, 745, 966 P.2d 1232, 1236 (1998), Petition Appendix (Petition App.) at 6a.

STATEMENT

A. The Nature and Purpose of the Regulatory Fee

Until the fee's repeal in 1993, the WUTC funded its motor carrier regulatory program with a regulatory fee imposed on carriers operating in Washington, whether engaged in intrastate commerce or interstate commerce. The fee was used only for regulatory purposes primarily to fund the state's motor carrier safety program. The WUTC enforced various safety rules (both state and federal) including rules on equipment, drivers' hours of service, and driver drug and alcohol use prohibitions.[2] No entity other than the carriers paying the fees received any services funded by the fee.

As a part of that program, all vehicles entering the state at a port of entry[3] were given at least a cursory inspection. If a potential problem was observed or suspected, a WUTC inspector conducted a more extensive inspection. These inspections ranged from a 10 minute inspection of the driver's license and recorded hours of service to a 30 to 40 minute inspection of brakes, steering, lights, and other safety equipment.[4] Approximately 10 to 15 percent of the vehicles entering the state were subject to such an additional inspection. In addition, inspections were conducted at weigh stations throughout the state, at other spots along federal and state highways, along city and county roads, and at the carriers' terminals.[5]

---

[2] *See* Wash. Admin. Code §§ 480-12-165 to -190 (1997). Wash. Admin. Code § 480-12-180(6) incorporated by reference various federal rules in 49 C.F.R. pts. 382-83, 391.

[3] There were five staffed ports of entry near state borders along major highways into the state. Clerk's Papers at 1276. This evidence, and much of the other evidence presented to the courts below, consisted of affidavits of persons familiar with in the safety inspection program during the period in question. This evidence, like virtually all of the evidence in this case, was not refuted by the Petitioner and its co-plaintiff below.

[4] Clerk's Papers at 1276-77.

[5] Clerk's Papers at 1277.

These inspections revealed a substantial number of violations of state and federal law, particularly by interstate carriers. For example, in one typical 48-hour inspection at the weigh stations along a major interstate highway in central Washington, 6,339 trucks crossed the scales, 1,201 were stopped and inspected, and 90 citations were issued. Eighty-four were issued to interstate carriers, two to carriers having intrastate authority, and four to carriers having no authority whatsoever.[6] Indeed, the Petitioner and its co-plaintiff below themselves "have each been cited for numerous violations of state safety rules." 136 Wn.2d at 757, 966 P.2d at 1252, Petition App. at 19a.

The Washington Supreme Court summarized:

> "During the time the regulatory fee was in place, the State of Washington had one of the better safety records in the nation, due, in part, to an exemplary inspection program by the UTC. The motor carrier safety program proved effective in reducing truck accidents as well as keeping illegal carriers from driving. The regulatory fee funded those efforts." *Id.*

The relatively high incidence of citations to interstate carriers (members of the plaintiff class[7]) versus those issued to intrastate carriers (non-class members) is consistent with the "significant differences in the regulatory burdens placed on the state by the two classes of vehicles."[8] This difference may be explained in part by the fact that 95 percent of all the carriers are in the plaintiff class. 136 Wn.2d at 751, 966 P.2d at 1293, Petition App. at 13a. The remaining five percent constituting the non-class carriers are generally smaller,

---

[6] Clerk's Papers at 1278.

[7] The superior court certified this case as a class action, with the plaintiff class consisting of all carriers operating at least, in part, in interstate commerce.

[8] App. at 11a. This was the unrefuted testimony of Larry A. Pursley, the Executive Vice President of the Washington Truckers Associations (WTA), which represents both interstate and intrastate motor carriers in Washington. Clerk's Papers at 1245-51. His testimony is included in the Appendix at 7a to 13a. The WTA supported the state below and filed a brief *amicus curiae* in the superior court.

travel fewer overall miles, make frequent stops, and carry different types of cargo.[9]

Based on this record, the Washington Supreme Court found that the plaintiff class posed special additional problems and burdens not posed by the intrastate carriers.

> "It is worth noting that Plaintiff carriers pose significant safety concerns not posed by carriers which operate solely in state. For example, Plaintiff carriers are typically away from their bases for two to three weeks at a time, precluding service and maintenance from being performed on their vehicles. Intrastate carriers, on the other hand, are generally back at their bases each night, and as a result are closer to and more likely to avail themselves of maintenance facilities. Another significant safety consideration is the fact that class carriers are paid on a mileage basis, which provides a powerful economic incentive to drive longer hours at a higher speed. Intrastate carriers, on the other hand, are not paid on a mileage basis." 136 Wn.2d at 756, 966 P.2d at 1242, Petition App. at 18a-19a.

The fee to fund this program was set generally on a per-vehicle basis, the exact amount dependent upon the size of the vehicle. However, for vehicles traveling in interstate eommerce, the WUTC was authorized to establish a "reduced schedule of fees for short term operations."[10] The

---

[9] See App. at 9a-11a. Note that this class configuration is different from that in *American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987)*. In *Scheiner*, the plaintiff class consisted of interstate carriers based outside Pennsylvania. They were compared to the "non-class" consisting of interstate carriers based in Pennsylvania. However, here, the plaintiffs were all interstate carriers, wherever based. In the "non-class" are the relatively few carriers which operate only in intrastate commerce.

[10] Former Wash. Rev. Code § 81.80.300 stated in part:

> "The commission may adopt rules and regulations imposing a reduced schedule of fees for short term operations, requiring reports of carriers, and imposing such conditions as the public interest may require with respect to the operation of such vehicles."

Commission so authorized various options for such interstate carriers. *See* 136 Wn.2d at 757-58, 966 P.2d at 1242, Petition App. at 20a.[11] For example, an interstate carrier sending a vehicle into Washington just one time did not have to pay the full per-vehicle fee. Instead, it could purchase a single trip permit for $10. Likewise, if the carrier had many vehicles, some of which would travel to Washington, but it did not know which ones, it could simply purchase "floater cards" at a reduced rate which could be passed from vehicle to vehicle.[12]

The fee was used only for regulatory purposes, predominantly the motor carrier safety program, and the Commission was directed to reduce the fees accordingly to fit its regulatory budget.[13] The statutory amount of $48 was a maximum only. Every year the Commission evaluated the forecasted revenues from the fee and the level of expenditures set by the legislature and reduced the statutory maximum to that level required for regulation and no more.[14] If in a given year there was a surplus or deficit in the motor carrier account, the level of the fee was adjusted in the future. Because of this, the fee for the larger vehicles ranged from $29 to $34 during the years in question. Therefore, as a matter of law and practice, the fee revenues were not diverted to the state general fund for any non-regulatory purpose.[15]

See also Former Wash. Rev. Code §81.80.318, Wash. Laws 1985, chapter 7, § 153, App. at 1a.

[11] Former Wash. Admin. Code §480-12-130(3)(b) (1993), App. at 3a-5a.

[12] The Petitioner and its co-plaintiff below did not take advantage of these options. Instead, they simply paid the full amount of the per-vehicle fee. The record reflects for one year during the period for which refunds are requested Petitioner paid more in fees than it was required to on 120 of 146 of its vehicles entering Washington. *See* Br. of Respondents and Cross-Appellants at 23, n.34.

[13] Former Wash. Rev. Code 81.80.320, App. at 1a-2a.

[14] Petitioner's recital that the fee was $48, Petition at 2, therefore is not correct. At no time did the WUTC assess a $48 fee.

[15] Petitioner notes that the fee proceeds were used for economic regulation of intrastate transportation as well as for the motor carrier

B. Procedure Below

The Petitioner and its co-plaintiff below filed this class action alleging three substantive claims.[16] First, they alleged that the fee violated the commerce clause, stating in their complaint:

> "The Regulatory Fee imposes an unappropriated,[17] flat tax on Carriers unrelated to the actual miles a Carrier's motive power vehicles travel in Washington. The Regulatory Fee, therefore, imposes, on average, a higher cost per mile traveled in Washington on the motive power vehicles of Plaintiffs and all members of the Plaintiffs' class that are not operated wholly within Washington than on the motive power vehicles of motor common or contract carriers that are operated wholly within Washington." Complaint at 7; Clerk's Papers at 13.

---

safety program of both interstate and intrastate carriers. Petition at 17-18, n.13. This is true. However, if Petitioner is suggesting that the interstate carriers subsidized the overall regulation of the intrastate carriers, that is wrong for at least two reasons. First, Petitioner fails to point out that, according to one estimate, there were 3.5 times as many class carriers subject to intrastate economic regulation as non-class carriers, Clerk's Papers at 862, so the "benefits" of the economic regulatory program were not all attributable to the non-class carriers. Second, even assuming the non-class intrastate carriers did impose some burdens on the state not imposed by some class carriers, it is also true, and undisputed, that class carriers imposed special safety regulatory burdens on the state not imposed by non-class carriers. See note 8; App. at 11a. If there was an overall subsidy, the Petitioner and its co-plaintiff had the burden to so demonstrate. As the superior court below determined, they never made such a showing. Petition App. at 42a.

[16] Below, the plaintiff class was represented by two class representatives, Franks & Son, Inc., and Coast Express, Inc. For unexplained reasons, Coast Express is no longer participating in this case. The Order granting class certification appointed both as class representatives. Clerks' Papers at 333-34. Whether this matter remains appropriate for a class action would be an issue should there ultimately be a remand.

[17] The plaintiffs likely intended to allege that the Regulatory Fee was "unapportioned."

Second, the plaintiffs alleged that the regulatory fee was preempted by the Interstate Commerce Act, 49 U.S.C. § 11506,[18] and its implementing regulations. The Washington Supreme Court held that the regulatory fee was not so preempted, and the Petitioner here has not sought review of that holding. Finally, the plaintiffs alleged that the regulatory fee violated 42 U.S.C. § 1983. This claim was dismissed by stipulation of the parties.

In 1990, plaintiffs sought a preliminary injunction against continued collection of the fee arguing that because refunds would be uncertain, injunctive relief was necessary.[19] The superior court, noting that the fee payments were "questionably refundable" nevertheless denied the request for an injunction, finding that "[t]here is no evidence on the question of whether the fees charged by vehicle are related to the cost of inspection per-vehicle" and that "the plaintiff does have the burden to go forth in producing evidence to show the discriminatory nature of the tax." Therefore, the court could not find that the plaintiffs were likely to prevail on the merits. Petition App. at 52a-53a. The court urged the plaintiffs to set the matter for trial before the next round of fees came due. *Id.* at 54a.

Instead, the plaintiffs filed a motion for summary judgment, as did the state. The superior court denied both motions, again noting the plaintiffs' lack of evidence, stating:

> "[T]hose challenging the regulatory fee through commerce clause analysis have the burden of proving factual unfairness of the tax burden's [e]ffect on interstate commerce. Basically, Plaintiffs still have offered no admissible evidence on the issue." Petition App. at 47a.

---

[18] This provision was repealed and recodified at 49 U.S.C. § 14504 by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

[19] In Plaintiffs' Brief in Support of Motion for Preliminary Injunction Escrowing Fee Proceeds, Clerk's Papers at 43, the plaintiffs stated that "[t]here is a clear risk that here, too, Plaintiffs and the members of Plaintiffs' class may be denied refunds because of a claim of state sovereign immunity or prospective-only application."

After further discovery, and a second round of cross motions for summary judgment, the superior court ruled that although the fee was not discriminatory,[20] and the fee was not shown to be "disproportionate to the benefit/burden of the [plaintiff carriers'] presence in Washington,"[21] it nevertheless violated the Commerce Clause because, under the test for a state tax set forth in *Complete Auto Transit, Inc.*

---

[20] Ultimately, before the superior court, the plaintiffs attempted to prove discrimination as did the plaintiffs in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), by comparing the fees paid per mile traveled by class carriers with the fees paid per mile traveled by non-class carriers. They attempted this with an affidavit of plaintiffs' counsel who took some mileage and fee data obtained through discovery, made some assumptions, and made a calculation. Clerk's Papers at 1181-83. The state's expert replaced the assumptions with facts, incorporated them into plaintiffs' analysis, and concluded that the fees paid per mile by class carriers were not dramatically different from the fees paid per mile by non-class carriers. Clerk's Papers at 1252-61. While the superior court characterized the fee-per-mile issue as disputed, it nevertheless determined that the fee was not discriminatory because the mileage analysis was conducted on the false premise that miles traveled was a valid measure of the burdens placed on the state by the carriers. The superior court stated:

> "In *American Trucking Ass'n v. Scheiner*, . . . miles traveled was a reasonable measure of the burdens for which the fee was intended to compensate (highway wear and tear). For purposes of a discrimination analysis, the regulatory fee must be considered in relation to that which is a fair measure of the benefit conferred or burden borne.
>
> "After considering the materials for the renewed motions, I am not satisfied that mileage is a fair measure as Plaintiffs' urge. Defendant's argument and supporting materials . . . suggest that highway safety has unique burdens imposed by interstate carriers. . . . *These factual claims are not refuted by Plaintiffs.*" Petition App. at 41a-42a (emphasis added).

[21] Petition App. at 39a. The plaintiffs have the "burden of proving the fees constitutionally excessive in relation to costs." *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 47 (1st Cir. 1984) (Breyer, J.).

v. Brady, 430 U.S. 274 (1977), it was not "internally consistent." Petition App. at 44a. However, the superior court nevertheless entered judgment for the state on the ground that the plaintiffs were not entitled to a refund. Petition App. at 39a.

On appeal, the Washington Supreme Court reversed, noting that the plaintiffs did not appeal the superior court determination that the fee was not discriminatory. 136 Wn.2d at 748, 966 P.2d at 1238, Petition App. at 10a.[22] The Court distinguished the regulatory fee from a tax and held the fee constituted an appropriate exercise of the state's regulatory power. Citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Washington Court held that the fee was evenhanded, did not discriminate against interstate commerce, served a legitimate local purpose, and did not place an undue burden on interstate commerce. 136 Wn.2d at 754-57, 966 P.2d at 1241-42, Petition App. at 16a-19a.

This Petition followed.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Challenged Regulatory Fee Is Not a "Tax"

Petitioner inappropriately attempts to import negative Commerce Clause analysis from tax cases into this case. As it argued below, Petitioner asks this Court to apply its decisions in *Complete Auto Transit v. Brady*, 430 U.S. 274,

---

[22] Petitioner argues that the Washington Supreme Court erred in this characterization, citing its presentation to the superior court and argument to the Washington Supreme Court as creating a dispute of fact. Petition at 11-13, n.8. However, in the passage quoted in note 20, the superior court was not addressing the calculations made by one of plaintiffs' attorneys in an affidavit in an attempt to show that class carriers' fees paid per mile exceeded non-class carriers' fees paid per mile. Rather, it was addressing the predicate question to that analysis: whether mileage traveled was even relevant to such analysis. Based on unrefuted evidence, the superior court determined it was not. Therefore, the Washington Supreme Court was correct when it stated that the superior court "found there was no discrimination in fact." 136 Wn.2d at 748, 966 P.2d at 1238, Petition App. at 10a.

287 (1977), and *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), both of which involved state taxes.[23]

However, Washington's motor vehicle regulatory program was funded by a "fee" not a "tax." Long ago, this Court articulated the distinction and held that the distinction is one of constitutional significance. *E.g.*, *Cooley v. Board of Wardens*, 12 How. (53 U.S.) 299, 314 (1851) (imposts and duties distinct from fees and charges for pilotage). In the *Head Money Cases*, 112 U.S. 580 (1884), this Court held that a fifty cent per passenger charge designed to defray the expense of regulating immigration was not a "tax" limited by the requirement of Article I, Section 8, of the Constitution requiring any tax to be "uniform" throughout the United States. This Court held that the levy was not a tax but "the mere incident of the regulation of commerce." *Id.* at 595.

The distinction between "taxes" and "fees" has been a comfortable one for this Court in a variety of modern contexts as well.[24] While the Petitioner attempts to question whether a principled line can be drawn between regulatory fees and general revenue measures, Petition at 17-18, there can be no doubt here that under any reasonable definition of a "regulatory fee" the fee at issue was one. The fee was in no sense a tax. All the proceeds of the fee were used for regulatory purposes. No fee payments were diverted to the general fund for general state purposes. If the fees generated revenues in excess of those needed for the regulatory program, the fee was adjusted downward to use any surplus in the fund. Petitioner seems concerned that the Washington

---

[23] Indeed, Petitioner, after calling the assessment in question a "Regulatory Fee" in its complaint and throughout the briefing before the Washington Supreme Court, now elects to call it the "Washington tax." Petition at 2. We will continue to refer to the assessment as the "regulatory fee," accepting the term used by all parties below and by the Washington Supreme Court and which accurately describes the legal status of the assessment.

[24] *E.g.*, *United States v. United States Shoe Corp.*, 523 U.S. ___, 140 L.Ed.2d 453, 457 (1998); *United States v. Sperry Corp.*, 493 U.S. 52, 60-62 (1989); *Massachusetts v. United States*, 435 U.S. 444, 462 (1978); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974).

Supreme Court applied a "state-law" test to determine whether the fee was exempt from the federal requirement that taxes be "internally consistent." Petition at 18. However, application of "federal law" would reach the same result.

The question before this Court then is whether the Washington regulatory fee must meet the "internal consistency" test to be valid under the Commerce Clause when the fee fairly approximates the regulatory burdens on the state imposed by the carriers and does not discriminate against interstate commerce.

B. The Decision Below Is Consistent with Prior Decisions of This Court

This Court has long recognized the unremarkable proposition that, absent federal preemption, states may (1) regulate within their borders to protect the health and safety of their citizens, even if that regulation affects interstate commerce, and (2) assess a non-discriminatory fee to reimburse the state for the costs of that regulation.

For example this principle was articulated in *Great Northern Ry. Co. v. Washington*, 300 U.S. 154 (1937), in which this Court stated:

> "The supervision and regulation of the local structures and activities of a corporation engaged in interstate commerce, and the imposition of the reasonable expense thereof upon such corporation, is not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution." *Id.* at 160.

In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), this Court invalidated a city ordinance which made it unlawful to sell milk which was not pasteurized within five miles of the center of the city. The Court concluded that the ordinance violated the Commerce Clause because there were "reasonable and adequate" alternatives available to the city to protect it from possible public health risks from milk pasteurized at distant locations, including those out-of-state.

> "If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for *it could charge the actual and reasonable cost of such*

> *inspection to the importing producers and processors.*" *Id.* at 354-55 (emphasis added).

This Court historically has upheld such regulatory fees in a variety of contexts, rejecting challenges that they were invalid taxes and invalid under the Commerce Clause. *E.g.*, *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935) (state fee to defray cost of local safety regulation of harbor traffic); *Morgan's Louisiana and Texas Railroad & Steamship Co.*, 118 U.S. 455 (1886) (state inspection fee to enforce quarantine laws).

In *Sprout v. City of South Bend*, 277 U.S. 163 (1928), cited in *Dean Milk*, this Court described the general standards under which such a regulatory fee may stand.

> "[T]he state may impose, even upon vehicles using the highways exclusively in interstate commerce, non-discriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of busses is a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded." *Id.* at 169.[25]

Petitioner would argue that this basic principle no longer is good law after *Scheiner*. It seeks to import the test of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), into this case, relying on *Scheiner* and *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 174 (1995).

In *Complete Auto Transit v. Brady*, 430 U.S. 274, 287 (1977), this Court held that a tax on interstate activity is valid if: (1) there is nexus to tax the activity; (2) the tax does not discriminate against interstate commerce; (3) the tax is fairly apportioned; and (4) the tax is fairly related to the services provided by the taxing state. Here, Petitioner focuses on the

---

[25] The *Sprout* Court invalidated the fee there at issue because "it [did] not appear that the license fee . . . in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose." 277 U.S. at 169. The fee at issue here has none of the defects of the fee invalidated in *Sprout*.

apportionment prong of this test.[26] Under that prong a tax is valid only if it is both "internally consistent" and "externally consistent." A tax is "internally consistent" if "imposition of a tax identical to the one in question by every other state would add no burden to interstate commerce that intrastate commerce would not also bear." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). Petitioner focuses only on the internal consistency test.

Petitioner's reliance on *Scheiner* is misplaced for two reasons. First, given its factual context, *Scheiner* cannot be read to so revolutionize Commerce Clause limits on state regulatory authority. Not only did *Scheiner* involve taxes, not regulatory fees, but the central issue in *Scheiner* was one of discrimination, not apportionment. This Court stated the issue in *Scheiner* as "whether the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the commerce clause." 480 U.S. at 282. In *Scheiner*, unlike in this case, there was proof of such discrimination against one set of interstate carriers in favor of another.[27]

Second, post-*Scheiner* cases demonstrate that the distinction between taxes and fees survives. In the related context of airport user fees, the Court in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), reaffirmed the test for fees it had earlier approved in *Evansville-*

---

[26] Before the superior court, the plaintiffs also contended that the regulatory fee did not pass the "fairly related" prong, *see* Petition App. at 34a, but failed in their effort to prove that claim. *Id.* at 39a. That issue was not pursued on appeal.

[27] In *Jefferson Lines* this Court so noted, stating "In *Scheiner*, we held that a flat tax on trucks for the privilege of using Pennsylvania's roads *discriminated* against interstate travel, by imposing a cost per mile upon out-of-state trucks far exceeding the cost per mile borne by local trucks that generally traveled more miles on Pennsylvania roads. 514 U.S. at 198 (emphasis added). The American Trucking Association (ATA) even presented the issue as one of discrimination in its briefs in *Scheiner*. Brief for Appellant at (i), *American Trucking Ass'ns v. Scheiner*, *see also* Jurisdictional Statement at (i).

Vanderburgh Airport Auth. Dist. v. Delta Airlines, 405 U.S. 707 (1972), stating

> "[A] levy is reasonable under *Evansville* if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." 510 U.S. at 369.

See also United States v. Sperry Corp., 493 U.S. 52 (1989) (fee to compensate government for costs incurred in connection with Iran-United States claims tribunal).

Oklahoma Tax Comm'n v. Jefferson Lines, 514 U.S. 175 (1995), involved a tax on the sale of a ticket for interstate bus travel. In that case, the Court declined the invitation to apportion the tax because the incidence of the tax, the sale, was an intrastate activity. Rejecting a claim that the tax should be apportioned on the basis of miles traveled, the Court stated that "miles traveled within the State simply are not a relevant proxy for the benefit conferred upon the parties to a sales transaction." 514 U.S. at 199. Likewise, here, as the lower courts found, mileage is not a relevant proxy for the burden of regulation imposed on the state by interstate carriers. No error was assigned to this finding.

We do not suggest that states may employ regulatory fees to circumvent protections afforded to interstate businesses under the Commerce Clause. The cited cases state ample protections. In *Sprout*, this Court stated that such fees may be "no larger in amount than is reasonably required to defray the expense of administering the regulations." 277 U.S. at 169. *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).[28] Put another way, a state

---

[28] In *Commonwealth Edison*, the Court upheld a Montana coal severance tax against a claim that the tax was so high that it did not approximate compensation to the state for the burden placed on the state. The Court distinguished *Evansville-Vanderburgh Airport Auth. District v. Delta Airlines*, 405 U.S 707 (1972), noting that the fees at issue in *Evansville* "cannot be tested by standards which generally determine the validity of taxes." 453 U.S. at 621-22. The Court stated:

> "Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services,

may not "appropriate[]" the proceeds to itself "and label[] the booty as a user fee." *See United States v. Sperry Corp.*, 493 U.S. at 62. And, of course, the fee, in conjunction with the regulatory program, may not be structured so as to discriminate against interstate commerce.

Here, those constitutional requirements are met. The fee is not discriminatory and is fairly related to the burdens placed on the state. Indeed, any concern about whether the fee is fairly related to the burdens placed on the state is eliminated by the fact that there are alternatives to the per-vehicle fee. Single trip permits and "floater cards" provide a less expensive alternative to interstate carriers providing limited services within Washington.[29]

Petitioner's concerns about the alleged commercial chaos that would ensue if multiple states were to impose fees similar to the now-repealed Washington fee are unfounded. To make its point, Petitioner relies on a hypothetical posed by dissenting Justice Sanders in the court below. Petition at 15, n.11. Justice Sanders pointed out that an interstate carrier traveling from Boston to Seattle would have to pass through at least 11 states, potentially subjecting itself to 11 separate fees. Comparing that carrier with an intrastate carrier traveling from Seattle to Spokane, he concluded that the intrastate carrier would have a "competitive advantage" over the interstate carrier. Putting aside the reality that the Boston to Seattle carrier is not in competition with the Seattle to Spokane carrier because they are in different markets, the simple response to Justice Sanders and the Petitioner is that each of those states has a right to protect its citizens from

---

we have required a showing based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered . . . .'" 453 U.S. at 622, n.12.

[29] At least two lower courts have indicated that such alternatives are relevant in such constitutional determinations. *See Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1, 12 (1st Cir. 1992) (opining that allowing a transfer of a permit from vehicle to vehicle would provide a "rough equivalence" between interstate and intrastate carriers); *Aloha Freightways, Inc. v. Commissioner of Revenue*, 428 Mass. 418, 701 N.E.2d 961, 967-68 (1998) (exemption from tax for carriers making de minimis contact with state).

unsafe trucks and inspect the trucks on the way through so long as its regulation is not discriminatory and does not place an undue burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Further, each state can collect from the interstate carrier the reasonable costs of that regulation.[30]

This might mean that the carrier traveling from Boston to Seattle may have to pay various fees while the carrier from Seattle to Spokane would pay only one. However, the interstate carrier also may be subjected to multiple inspections along the way whereas the intrastate carrier may be subject to only one. The incidental burdens of multiple inspections, like the incidental burdens of multiple fees, does not run afoul of the Commerce Clause so long as those burdens are not "clearly excessive." 136 Wn.2d at 754, 966 P.2d at 1241, *citing Pike v. Bruce Church, Inc.*, 397 U.S. at 142, Petition App. at 16a.

Indeed, under Petitioner's theory, legitimate and long-standing state licensing and regulatory programs could be hampered. This case arises in the context of a now repealed motor carrier regulatory fee. Application of Petitioner's theory to this repealed fee could implicate any state license system designed to protect the public. For example, business registration fees, hunting or fishing license fees, and bar license fees for attorneys would be invalidated by application of the "internal consistency" test as under Petitioner's theory. An attorney practicing law in Washington and Oregon could argue that Washington's flat, per attorney, bar dues must be apportioned, perhaps on a revenue basis. A traveler vacationing in Montana could argue that a hunting or fishing license should be apportioned based on days of use. A multistate business, faced with a registration fee for state revenue reporting purposes or workers compensation

---

[30]Of course, if Congress were to have viewed the imposition of per vehicle regulatory fees by multiple states (either actual or hypothetical) as a threat to interstate commerce, it could have intervened. Indeed, in a number of areas involving interstate commerce, Congress has preempted state authority over state taxes. *E.g.*, 49 U.S.C. §§ 14502, 40116. But Congress took advantage of none of those opportunities to find and declare state regulatory fees contrary to any federal interest.

administration, would argue that such fees should be reduced because it is subject to such burdens (and perhaps differing ones) in multiple states, while its in-state competitors must deal with only one government regulator. Each of these legitimate regulatory fees is plainly valid. There is no reason to place each of them in jeopardy by importing Petitioner's tax analysis into this Court's examination of regulatory fees.

The policy permitting states to collect costs of regulation from interstate businesses reflected in various past decisions of this Court is a sound one. The test suggested in *Sprout*, *Commonwealth Edison*, *Evansville*, *Northwest Airlines*, and many other cases would allow regulatory fees only if they (1) do not discriminate against interstate commerce, (2) are used only for regulation, and (3) are reasonably related to the cost of regulation. That test is fully satisfied here.

To hold that a non-discriminatory fee, that is fairly related to the services performed, must nevertheless be apportioned would mean that apportionment would be required even if both the class and non-class carriers paid 100 percent of the costs of regulation attributable to them. In that case, the result of reducing the fees on interstate carriers would mean that such reduction would have to be made up elsewhere. This would lead to the intrastate carriers paying more than 100 percent of the share attributable to them. Under the Petitioner's theory in this case, interstate commerce would not have to "pay its way." *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977). Indeed, it would be the intrastate carriers, not the interstate carriers who would be subjected to a "double whammy." Petition at 16-17. The intrastate carriers would have to pay for the reasonable costs of their own regulation as well as a portion of the costs imposed by the interstate carriers and still be subject to the same regulatory burdens as those interstate carriers. This is not what the constitution does or should require.

In sum, the opinion below is consistent with existing negative Commerce Clause doctrine and should not be disturbed.

C. The Decision Below Is Consistent with the Great Majority of Lower Court Decisions

The Petitioner suggests that lower federal appellate courts and state supreme courts are in conflict on whether a regulatory fee must be apportioned pursuant to the "internal consistency" test. Petition at 19-23. The Petitioner cites only three cases supporting its view[31] and three cases (not including the instant one under review) supporting the state's position.[32] However, the alleged split in lower court authority is not quite as severe as the Petitioner suggests. Not only is there more authority supporting the proposition that a regulatory fee need not be apportioned,[33] but not all cases cited in support of the Petitioner's position are apposite.

While the Supreme Judicial Council of Maine did invalidate a flat, annual "hazardous material fee," only 10 percent of that fee was dedicated for inspection or other regulatory purposes. Much of the rest went to a "hazardous waste fund." *American Trucking Ass'ns, Inc. v. Secretary of State*, 595 A.2d 1014, 1015 (Me. 1991).[34] Here, 100 percent

---

[31] *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993); *American Trucking Ass'ns, Inc. v. Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993); *American Trucking Assn's, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991). The Petitioner also cites a number of cases invalidating various types of *Scheiner*-type taxes. Petition at 22, n. 16.

[32] *V-1 Oil Co. v. Utah State Dept. of Pub. Safety*, 131 F.3d 1414 (10th Cir. 1997); *Interstate Towing Ass'n v. Cincinnati*, 6 F.3d 1154 (6th Cir. 1993); *Department of Banking & Finance v. Credicorp, Inc.*, 684 So.2d 746, 752 (Fla. 1996).

[33] *E.g., Center for Auto Safety, Inc. v. Athey*, 37 F.3d 139 (4th Cir. 1994) ("user fee" analysis under *Evansville* applied to fee used to defray costs of charity registration program); *Seibert v. Clark*, 619 A.2d 1108, 1113-17 (R.I. 1993) (flat $10 per vehicle "fuel decal" fee upheld against apportionment and discrimination charges).

[34] The Maine case is also distinguishable in two other ways. First, the court there used a mileage analysis which the state could not rebut. Second, as to whether there was a practicable alternative to the tax, the state offered only a modicum of evidence, that being simply an

of the fee was so dedicated. And though the Supreme Judicial Council of Massachusetts did invalidate a per-vehicle charge, it did so based on the conclusion that on a class basis "local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." *American Trucking Ass'ns, Inc. v. Secretary of Administration*, 613 N.E.2d 95, 101 (Mass. 1993). Here, that is not the case. Moreover, recently, in *Aloha Freightways, Inc. v. Commissioner of Revenue*, 428 Mass. 418, 701 N.E.2d 961 (1998), the Massachusetts court distinguished *Secretary of Administration* and *Scheiner* because in those cases there was no provision for a lower fee for carriers making de minimis contact with the state. Like Washington's regulatory fee, which allowed for single trip permits and other options for interstate carriers, the Massachusetts tax at issue in *Aloha* gave a break to carriers having minimal operations in the state. 701 N.E.2d at 968.

That leaves the single case of *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993), as arguably in conflict with the opinion below. Though that case contains language supporting Petitioner's argument, it too is distinguishable. The annual registration fee at issue was "part and parcel" of a ban on vehicles used to transport solid wastes from "backhauling" certain other commodities. The court declared the "backhaul ban" unconstitutional as an undue burden on interstate commerce. *Id.* at 1281. Though the court continued its analysis, finding problems under

---

assertion in an affidavit which the court did not find to be adequate evidence. 595 A.2d at 1018. Here, plaintiffs failed to show mileage was an appropriate proxy nor did they rebut the state's evidence of the lack of alternatives to the fee. The other hazardous materials transportation fee case cited by Petitioner that arguably supports an apportionment analysis is likewise distinguishable. The fee involved in *American Trucking Ass'ns, Inc. v. Wisconsin*, 205 Wis.2d 489, 556 N.W.2d 761 (Wis. App.), *rev. denied*, 207 Wis.2d 287, 560 N.W.2d 274 (1996), was used only for emergency response, not for regulatory purposes. The case also is distinguishable in that the state in effect admitted there was a practicable alternative to the fee. *Id.* at 768.

Scheiner, that analysis was not necessary to its ultimate holding.[35]

So, at most, only the *Bayh* case stands in contrast to the decision below, and that case is distinguishable. This is hardly the sort of conflict in the lower courts that cries out for resolution by this Court, particularly since the statute in question was repealed six years ago. If the current litigation pending in state courts regarding the validity of per-vehicle fees on transporters of hazardous materials result in a conflict, Petition at 27, n.23, then perhaps review by this Court will be warranted at some future time. But for now, the issue regarding fees on motor carriers is not one that has divided lower courts and does not merit this Court's attention.

D. The Constitutional Issue Raised by the Now Repealed Washington Regulatory Fee Is Not So Significant as to Warrant Review in this Case

Petitioner makes four points in its argument that the issue raised in this case is an "important and recurring one." Petition at 23-28. None of its points is valid.

First, Petitioner raises the specter of states continuing to impose "flat taxes" on interstate carriers and cites a number of state statutes which impose per-vehicle or per-carrier fees on transporters of hazardous materials. The cited fees appear to be of varying types,[36] and, by their description, not all appear to be used exclusively for regulatory purposes.[37] Just how review of this case would assist in providing guidance to other courts considering such fees on

---

[35] The court also indicated that the problem with the fee was that it affected the small, casual hauler more than it affected the large, frequent hauler. Following the analysis of the Massachusetts court in the recent *Aloha Freightways* decision, the single trip permit and other options in the Washington fee address this concern.

[36] Included in the list provided by the Petitioner are "permit," "processing," "transporter," "administrative," and "monitoring" fees. Petition at 24-25, n.17.

[37] *See* Petition at 25, n.18, *citing* N.Y. ECL § 72-0201(11)(b) (one-half of revenues used for "purposes of carrying out the provisions of this chapter").

transporters of hazardous materials is unclear. Indeed, in the one cited case involving American Trucking Associations, Petition at 27, n. 23, the plaintiffs there presented evidence of actual discrimination, just as they did in *Scheiner,*[38] proof which plaintiffs here contend is not necessary. Further, while state concerns with motor carrier safety are significant, transportation of hazardous materials may trigger different concerns and a different federal statutory overlay.[39]

Second, Petitioner suggests that the Washington Court will "foment continuing litigation" about the validity of "unapportioned taxes." The state doubts that the Washington decision will lead to more litigation over "taxes." *Scheiner* and its progeny have resolved those issues. Litigation over motor carrier regulatory fees, like the repealed fee at issue here, is also not likely given the federal base state program which made continuation of Washington's fee system administratively difficult.[40] To the extent that Petitioner is concerned about state hazardous waste transporter fees, there already is litigation on that front and, according to Petitioner, Petition at 24, n.17, there are ample statutes over which to litigate.

Third, Petitioner expresses sympathy for state legislators who may not know whether to repeal regulatory fees or enact them, and may unwittingly subject their states to substantial refund liability, citing *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). However, pursuant to this Court's direction in *McKesson*, such legislators can protect their states adequately

---

[38] *American Trucking Ass'ns, Inc. v. State of New Jersey*, No. A-0006334-97T3F (N.J. Super. Ct. App. Div.) (ATA Br. at 45-64, basing discrimination argument on dollars paid per manifest). One of the counsel for the Petitioner in this appeal is among the counsel for the ATA in the New Jersey case.

[39] *Eg.*, in *American Trucking Ass'ns, Inc. v. State of New Jersey*, No. A-0006334-97T3F (N.J. Super. Ct. App. Div.), the state appellants argue that the Hazardous Materials Transportation Uniform Safety Act, 49 U.S.C.A. App. 1801 *et seq.*, gives states authority to impose transporter fees. Br. of State of New Jersey at 37-43.

[40] See note 1.

from such refund obligations. *Id.* at 45 (referring to a variety of means including "relatively short" statutes of limitations).

Finally, Petitioner reminds the Court that, despite the repeal of this fee in 1993, the constitutional issue here is not moot because the class of carriers the Petitioner and its co-plaintiff represented below sought refunds. However, even assuming Petitioner were to prevail on the merits of its claim in this Court, there would remain substantial legal and factual questions which would have to be resolved before the 95 percent of the carriers in the plaintiff class could claim refunds. First, even assuming *Scheiner* applies, there would be the issue of whether the per-vehicle fee and its administrative alternatives were the only "practicable means" to collect the costs of regulation and whether a "more finely gradated user fee schedule would pose genuine administrative burdens." 483 U.S. at 296.[41] As was the case with the evidence on the relevance of mileage as a proxy, the state presented evidence as to why mileage-based or revenue-based allocation method was not "practicable." As with the evidence on whether mileage is a proxy for the burden on the state, this evidence went unrebutted.[42]

Further, as the superior court held, Petition App. at 38a, plaintiffs would not be entitled to a refund in any event. Even assuming the fees are subject to the same procedural due process analysis as are taxes, the predeprivation remedy of injunction was available to the plaintiffs. Petition App. at 39a; *see McKesson Corp. v. Division of Alcholic Beverages & Tobacco*, 496 U.S. 18, 36-37 (1990).

---

[41] This Court in *Scheiner* stated, after rejecting precedents for flat taxes:

> "Those precedents are still valid, however, in their recognition that the Commerce Clause does not require the states to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens." 483 U.S. at 296 (footnote omitted).

[42] *See* Br. of Respondents and Cross-Appellants at 26.

CONCLUSION

For the reasons stated above, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General
JEFFREY D. GOLTZ*
WILLIAM BERGGREN COLLINS
Senior Assistant Attorneys General
*Counsel of Record
P.O. Box 40128
Olympia, WA 98504
(360) 664-1186

March 1999

APPENDIX

81.80.318 Any motor carrier engaged in this state in the casual or occasional carriage of property in interstate or foreign commerce, who would otherwise be subject to all of the requirements of this chapter, shall be authorized to engage in such casual or occasional carriage, upon securing from the commission a single trip transit permit, valid for a period not exceeding ten days, which shall authorize a one way trip in transporting property for compensation between points in the state of Washington and points in other states, territories, or foreign countries.

No identification cab cards and decals or stamps or numbers and no regulatory fees other than as provided in this section shall be required for such permit. The permit must be carried in the cab of the motive power vehicle.

The permit shall be issued upon application to the commission or any of its duly authorized agents upon payment of a fee of ten dollars and the furnishing of proof of possession of public liability and property damage insurance in limits of at least twenty-five thousand dollars, for injury or death of any one person, and subject to such limit as to any one person, for one hundred thousand dollars for injury or death of all persons caused by any one accident and for ten thousand dollars for all damages to property caused by one accident. Such proof may consist of an insurance policy or a certificate of insurance.

The commission shall not be required to collect the excise tax prescribed by RCW 82.44.020 on any vehicle subject only to the payment of this fee.

81.80.320 In addition to all other fees to be paid by him, every "common carrier" and "contract carrier" shall pay to the commission each year prior to receiving his identification decal or stamp or number for each motive power vehicle operated by him, based upon the maximum gross weight thereof as set by the carrier in his application for his regular license plates, plus any additional tonnage or log tolerance permits, the following fees:

Less than 4,000 pounds..... $ 7.00

. . .

72,000 pounds or more and less than 76,000 pounds..... 48.00

In the event that trailers or semitrailers are separately licensed for gross weight and not included within the licensed gross weight of the motive power vehicle as prescribed above, the fees provided herein shall be computed on the basis of the licensed gross weight of the trailer or semitrailer, plus any additional tonnage or log tolerance, and a separate identification cab card will be issued in the same manner as for a motive power vehicle under RCW 81.80.300.

It is the intent of the legislature that the fees collected under the provisions of this chapter shall reasonably approximate the cost of supervising and regulating motor carriers subject thereto, and to that end the utilities and transportation commission is authorized to decrease the schedule of fees provided in this section by general order entered before November 1st of any year in which it determines that the moneys then in motor carrier account of the public service revolving fund and the fees currently to be paid will exceed the reasonable cost of supervising and regulating such carriers during the next succeeding calendar year. Whenever the cost accounting records of the commission indicate that the schedule of fees as previously reduced should be increased such increase, not in any event to exceed the schedule set forth in this section, may be effected by a similar general order entered before November 1st. Any decrease or increase of gross weight fees as herein authorized, shall be made on a proportional basis as applied to the various classifications of equipment.

All fees collected under this section or under any other provision of this chapter shall be paid to the commission and shall be by it transmitted to the state treasurer within thirty days to be deposited to the credit of the public service revolving fund.

WAC 480-12-130(3)

(3) The stamp fee named in subsection (2) applies to each stamp applied for. The regulatory fee is also payable in connection with each stamp and is determined as follows:

. . .

(b) In lieu of the payment of a full regulatory fee for each vehicle or combination of vehicles operated across or between points in the state and points outside the state exclusively in interstate or foreign commerce, and as to vehicles operated between points in this state and points outside the state in interstate commerce as well as points within this state in intrastate commerce, the regulatory fee may, at the request of the carrier, be paid on the basis of one of the following options:

Option 1. Floater regulatory fee cards.

Carriers who operate vehicles between points in this state and points outside this state exclusively in interstate commerce, and carriers who operate fleets in excess of 200 motive power units between points in this state and points outside this state interstate commerce as well as points within this state in intrastate commerce may elect to purchase unassigned regulatory fee receipts at one hundred fifth percent of the applicable gross weight fee stated in subsection (2). One of these regulatory fee receipts must be carried within the cab of the motive power vehicle when such equipment is operate din this state and must be accompanied by a properly executed National Association of Regulatory Utility Commissioners uniform identification cab card and Washington utilities and transportation commission identification stamp. When applied for in this manner the fee must be that for the highest gross licensed weight of such solo or combination with which the receipt showing the payment of regulatory fees may be used.

The carrier must purchase for three dollars an identification stamp for each power unit.

In the case of unladen automobiles and trucks operated in interstate driveaway service across or between points in the state and points outside the state, the carrier may use unassigned Nationa! Association of Regulatory Utility Commissioners uniform identification cab cards and

Washington utilities and transportation commission identification tamps upon payment of one hundred fifty percent of the applicable gross weight fee and the three dollar stamp fee for each unassigned cab card and stamp.

Option 2. Lump sum regulatory fee payments.

Carriers who operate fleets in excess of 200 motive power vehicles either exclusively in interstate or foreign commerce across or between points in this state and points outside this state or between points in this state and points outside this state in interstate commerce as well as points within this state in intrastate commerce, and who have so operated under Option 1, above, or this option for the immediately preceding calendar year, may elect to pay a lump sum regulatory fee based on the number of power units for which identification stamps have been purchased during the immediately preceding calendar year at the regulatory fee established by general order of the commission entered before October 1st of any year. These carriers must purchase a three dollar identification stamp for each power unit. With a properly executed National Association of Regulatory Utility Commissioners uniform identification cab card and Washington utilities and transportation commission identification stamp attached, no proof of regulatory fee payment need be carried.

Option 3. Single trip transit permit.

Carriers engaged exclusively in casual or occasional interstate or foreign commerce across or between points in the state and points outside the state may as in alternative to all other requirements of this chapter obtain a single trip transit permit, valid for ten days, authorizing a one-way trip into, out of or across the state. This permit will be issued upon payment of a fee of ten dollars and must be carried in the cab of the power vehicle. The carrier must state the name and policy number or binder of the insurance company with whom the carrier has insurance which meets the provisions of WAC 480-12-350.

Option 4. Single trip regulatory fee card.

A carrier registered with the Washington utilities and transportation commission to engage in interstate or foreign commerce across or between points in this state and points

outside of this state, may purchase single trip regulatory fee cards, valid for seventy-two hours, authorizing a trip into, out of or across this state, for a fee of ten dollars each.

Prenumbered single trip regulatory fee cards must be purchased at any commission office or port of entry, or from an authorized commission field agent. The card must be carried in the power unit.

(c) In intrastate or interstate commerce between points within the state of Washington the identification cab card and stamp may, at the request of the carrier, not be assigned to any particular motive power vehicle under the following circumstances:

(i) In connection with trucks or tractors to be operated under master leasing agreements provided for in WAC480-12-210(1)(h), in which case the cab card may be used only with vehicles operated under such master leasing agreements; and

(ii) In connection with unladen automobiles or trucks in driveaway service, in which case the cab card may be used only with such vehicles in driveaway service. The fees shall be as stated in subsection (3)(a) for the highest gross licensed weight (highest actual weight in driveaway service) on any power vehicle with which the identification cab card and stamp may be used.

(d) In intrastate commerce between points within the state of Washington, a common or contract carrier acquiring the use of private carrier equipment under the provisions of WAC 480-12-210(1)(c) may, in connection with short term leases, elect to purchase single trip regulatory fee cards, valid for seventy-two hours, authorizing a one-way trip between points within this state, for a fee of ten dollars each, in lieu of payment of the full regulatory fee.

Prenumbered single trip regulatory fee cards must be purchased in advance and no refunds will be allowed for unused cards. Cards must be filled out, in ink or by typewriter, by the carrier, showing the description of the vehicle, license number, state in which the vehicle is licensed, name of owner, the commodity to be transported, the origin and destination of the shipment and be signed by an officer, agent or employee of the carrier authorized to use

the card. The card must be carried in the power unit. The vehicle operating under a single trip regulatory fee shall be under the control and direction of the motor carrier issuing the card and shall be used only within the scope of the authority of that motor carrier.

At the end of each calendar month a report shall be sent to the commission, showing the card number, date used, original of shipment, destination of shipment and vehicle number.

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

FRANKS & SON, INC., et al., Plaintiffs, v. STATE OF WASHINGTON; WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, et al., Defendants.	NO. 90-2-00495-1 DECLARATION OF LARRY A. PURSLEY

I, LARRY A. PURSLEY, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I have personal knowledge of the matters contained in this declaration and am competent to testify on such matters.

2. I am the Executive Vice President of the Washington Trucking Associations (WTA). WTA is an organization composed of approximately 1200 member firms, consisting of truckload, less-than-truckload (LTL), bulk, heavy haul, log truck, dump truck, household goods, and other motor carriers as well as suppliers to the trucking industry. Member carriers transport goods in interstate, intrastate, and foreign commerce.

3. The purpose of the WTA is set forth in its constitution as amended December 5, 1990. The relevant portion states as follows:

> The objects of this Association are for the purposes of bringing closer together all operators of motor vehicles engaged in the transportation of property in both intrastate and interstate commerce in the State of Washington authorized to transport property by motor vehicle by reason of permits issued

to them by the State of Washington, and in some cases, by reason of certificates or permits issued to them by the Interstate Commerce Commission, Bureau of Motor Carriers, and also engaged in the transportation of property by motor vehicle in connection with their own private operation; and in order that the service to the public may be improved, the cost of operation lessened and the rights of the respective operators protected.

It shall also be the object of the Association to further the advancement of the interests of transporters of property by motor vehicle; the education of those engaged in such transportation on matters affecting the operation of motor vehicles including safety facilities, safety devices, and laws governing such operations; to affiliate with or to establish reciprocal relations with any other association, commercial or industrial, and with the American Trucking Associations, Inc.; and to participate by election of directors of the American Trucking Associations, Inc. and in the activities of such Association nationally; to act as the medium for the expression of views of its members on matters affecting the interests of those engaged in the transportation of property; to foster and advance safety on the public roads and highways; and to do such things as may be proper to create and stimulate a fair and intelligent attitude on the part of the public with respect to the transportation business of its members and to accomplish fair and intelligent legislation with respect thereto; to promote and foster the business of its members and distribute to such members and the pubic accurate and reliable information on matters of transportation; to do everything possible to remove abuses from the business of transportation; and to promote harmony among the members of this Association.

4. I have served as Executive Vice President of the WTA since 1991. Prior to serving as Executive Vice President, I served in the WTA in a variety of capacities since 1976.

5. In the course of that employment, I have developed extensive personal knowledge of all facets of the motor carrier industry, both as it operates intrastate and interstate. I also am very familiar with the Washington Utilities and Transportation Commission (Commission) and its regulatory operations, including the administrative of the regulatory fee which is the subject of this litigation and which was repealed effective January 1, 1994.

6. Through conversations with Commission staff and administrators, and with counsel for the WTA, I am familiar generally with the subject in the above-captioned litigation. The WTA filed an amicus brief in support of the Commission's initial motion for summary judgment. The Executive Committee of the WTA decided to file that brief opposing the relief sought by the plaintiffs. We argued in that brief that 'the WUTC's regulatory fee [was] not unconstitutionally discriminatory against interstate commerce, nor [was] it preempted by the Interstate Commerce Act.'

7. As I understand this case, the plaintiff class consists of those carriers which operate in whole or in part in interstate commerce. Non-class members consist only of those carriers who operate exclusively in intrastate commerce. The WTA membership consists of both class and non-class members.

8. There are substantial differences between the class and non-class carriers. These include the following:

a. First, there is difference between the class and non-class relating to the types of loads they carry. Carriers operating purely interstate are predominantly 'truckload' carriers. That means that they carry one shipment per truckload (as opposed to LTL which consists of several shipments per truck on behalf of a variety of shippers). Truckload carriers generally travel into this state using major highways to a single destination and drop off their truckload. They may or may not pick up another truckload shipment and carry that out-of-state, again without making any further stops. Such truckload carriers do not 'distribute' goods to a variety of destinations on behalf of number of different shippers.

In contrast, LTL haulers, and proportionately many more members of the non-class, are local delivery carriers. These carriers transport goods from a central drop-off point, such as a warehouse, to a number of delivery points within the area.

Further, there are certain types of trucks which travel almost exclusively intrastate (though the goods they carry may actually travel interstate). One example of these is log trucks which carry logs on relatively short hauls from the woods (frequently off-road) to a processing facility or to a port facility for export. Many of these trucks in addition to traveling limited distances are only operated during limited times of the year, perhaps as few as thirty days. Other carriers serving the wood products industry, such as those carrying wood chips also would tend only to be intrastate vehicles. Other such types would be dump truck operators, sand and gravel haulers, and small parcel delivery vehicles or couriers. All these generally travel within a confined area, travel limited mileage, and make frequent stops.

b. Second, there is a difference between the class and non-class carriers relating to aggregate number of miles travelled per vehicle. A typical truckload hauler may travel well over 100,000 miles per year, usually over major highways. Because drivers of truckload carriers generally get paid by the mile travelled, there is an economic incentive to travel more miles. In contrast, an LTL carrier or other non-class member would generally travel shorter distances and make a number (sometimes frequent) of stops or deliveries in a given day. Therefore, the average per vehicle number of miles travelled by such a carrier would be less than the interstate carrier. So, for example, a pure interstate vehicle which transports goods regularly from San Francisco to Seattle may travel over 100,000 miles per year, 20,000 of which may be within Washington, while an LTL carrier or other delivery vehicle may travel only 20,000 in total, all within Washington.

c. Third, there is a difference as to routes traveled. Truckload (class member) carriers generally travel over interstate and other large state highways. Non-class members are significantly more likely to travel over

secondary highways into every nook and cranny of the state and around city streets in small towns and urban areas.

d. Fourth, because truckload carriers generally transport goods over long distances, there are significant safety concerns posed by class carriers that are less of a problem with non-class carriers. As stated above, a typical interstate truck may travel well over 100,000 miles per year, usually on major federal or state highways. Such a vehicle, assuming it is based outside Washington, frequently is away from its base for two to three weeks at a time. The driver generally is paid on a mileage basis. These facts have two significant ramifications for safety. First the longer the vehicle is away from home, the greater chance that the vehicle will need maintenance or servicing. Second, because there is an economic incentive for drivers of such interstate haulers to driver longer hours, there is an increased concern about hours of service violations. In contrast, a pure intrastate vehicle usually is back at its terminal each night, closer to its own maintenance facilities. Further, drivers of such trucks generally are not paid on a purely mileage basis, so there is less concern for hours of service violations.

e. Fifth, there are significant differences in the regulatory burdens placed on the state by the two classes of vehicles. These are in addition to the added burdens discussed in my fourth point above. Interstate vehicles impose burdens at the ports of entry which are not shared by non-class carriers. Intrastate vehicles based in-state can be inspected easily at terminals. Interstate carriers based out-of-state are more difficult to reach for purposes of inspection. Therefore, it is necessary to conduct elaborate roadside inspections, usually on major highways, in order to cover the interstate, non-Washington based carrier, to adequately the public from safety violations.

9. Intrastate carriers also make a greater contribution to general state revenues than those interstate carriers with no place of business in Washington. The State of Washington imposes a public utility tax on gross revenues of carriers intrastate operations. The statute exempts revenues from all interstate operations. Therefore, a carrier transporting goods from Portland, Oregon, to Spokane, pays no public utility tax on its revenues, while a carrier

transporting the same load from Vancouver, Washington, to Spokane, would pay such tax on revenue from this intrastate operation.

Further, if the carrier is based in Washington, it also will pay local taxes and business license fees in each city in which it has terminal facilities. In short, intrastate carriers carry more than their burden of providing funds to the state general fund and to local governments compared to interstate carriers which provide almost no such revenues, even though interstate carriers require state police and fire protection and also benefit from many other government services.

10. Prior to the repeal of the regulatory fee system at issue in this litigation, the Commission offered a variety of administrative options to carriers which transport goods in interstate commerce. These include floater cards, single trip regulatory fee cards, single trip permits, and lump sum regulatory fees. These were beneficial to those interstate carriers which did not have a predictability of operations which would result in their vehicles being present in Washington a significant portion of the time.

The single trip permit and single trip regulatory fee card options allow carriers to forego paying the annual regulatory fee and instead purchase such a permit or fee card at the border. Such a purchase is not administratively inconvenient because the carrier has to stop anyway. Many carriers take advantage of such an option.

Floater cards are useful particularly for those truckload carriers operating on a fixed route (say, for example, Los Angeles to Seattle). The carrier may have hundreds of vehicles in its fleet, but it may not know which of the vehicles would be designated to carry a load from Los Angeles to Seattle. Therefore, the carrier could purchase a number of floater cards and keep them in Los Angeles. When a truck is dispatched to Seattle, the dispatcher simply provides the driver with the floater card, which is returned when the truck returns to Los Angeles for use by the next truck heading north. Should the carrier run short of such floater cards, the driver of the vehicle would have the option of purchasing a single trip regulatory fee card at the border or, if it believes that the vehicle would be entering the state frequently, it could pay a full regulatory fee.

11. The WTA and its members have never considered the now repealed regulatory fee on carriers to be a burden on carriers. The WTA and member carriers always have believed that the interests of the motor carrier industry are best served by a solid safety enforcement program in this state. Carriers frequently operate on small profit margins, so there can be incentives to avoid or defer appropriate maintenance on vehicles. A good, solid safety program which insures compliance with state and federal rules and regulations is essential to a level competitive playing field in the motor carrier industry and ensure safe highways for all Washington citizens. The State of Washington has had one of the better safety records in the nation due, in part, to solid inspection program by the WUTC. The regulatory fee challenged in this litigation funded those efforts.

DATED and SIGNED this [16th] day of May, at Federal Way, Washington.

/s/
LARRY A. PURSLEY

Supreme Court, U.S.
FILED
MAR 12 1999
OFFICE OF THE CLERK

No. 98-1282

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANKS & SON, INC., on behalf of themselves and all others similarly situated

Petitioners,

v.

THE STATE OF WASHINGTON, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, AND OFFICE OF THE STATE TREASURER

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBERT DIGGES, JR.
ATA LITIGATION CENTER
2200 MILL ROAD
ALEXANDRIA, VA 22314
(703) 838-1889

WALTER HELLERSTEIN*
UNIVERSITY OF GEORGIA
LAW SCHOOL
ATHENS, GA 30602
(706) 542-5175

* *Counsel of Record*

2722

QUESTION PRESENTED

Whether the Commerce Clause requirement that state taxes be fairly apportioned is applicable to "regulatory fees" — that is, state exactions that are used to pay for regulatory activity.

TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . (I)

TABLE OF AUTHORITIES iii

REASONS FOR GRANTING THE PETITION 2

INTRODUCTION 2

I. LOWER COURTS NEED GUIDANCE ON THE RELEVANCE AND APPLICATION OF THE "TAX VERSUS FEE" DISTINCTION 6

II. THE COMMERCE CLAUSE'S APPORTIONMENT REQUIREMENT APPLIES EQUALLY TO TAXES AND FEES 12

A. The Validity of a State Charge Under the Commerce Clause is Based Upon its Practical Effect on Interstate Commerce 12

B. Because the Practical Effect of Flat Taxes and Fees Under the Commerce Clause is the Same, There is no Basis for Applying a Different Legal Analysis . . 15

C. Separate Commerce Clause Standards for Fees and Taxes Would Needlessly Complicate Judicial Review, Leading to State Manipulation of Charges and Inconsistent Results 17

III. A *PIKE* ANALYSIS IS NOT APPROPRIATE FOR REGULATORY FEES 18

CONCLUSION 20

TABLE OF AUTHORITIES

Pages

Cases

American Trucking Associations, Inc. v. Conway, 566 A.2d 1323 (Vt. 1989) 3

American Trucking Associations, Inc. v. Denn, No. C2-95-4910 (Dist. Ct., Ramsey Cty., 1995) 3

American Trucking Associations, Inc. v. Goldstein, 541 A.2d 955 (Md. 1988) 3

American Trucking Associations, Inc. v. Gray, 746 S.W.2d 377 (Ark. 1988) 3

American Trucking Associations, Inc. v. Kline, 9 N.J.Tax 631 (N.J., 1987) 3

American Trucking Associations, Inc. v. New Hampshire, No. 89-E-00405-B (N.H. Super. Ct., Merrimack Co., 1995) 2

American Trucking Associations, Inc. v. New Hampshire, No. 89-E-00405 (N.H. Super. Ct., Merrimack Co., 1991) 3

American Trucking Associations, Inc. v. New Jersey, No. 001601-94 (N.J. Tax Ct.) 5

American Trucking Associations, Inc. v. New Jersey, No. 001601 (N.J. Tax Ct., filed Feb. 17, 1994) 3, 5

American Trucking Associations, Inc. v. New Jersey, No. 011562-92 (N.J. Tax Ct. March 23, 1998), *appeal docketed*, No. A-6334-97T3F (N.J. Super. Ct., App. Div. July 15, 1998) 1, 2

American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987) . . . . . *passim*

American Trucking Associations, Inc. v. Secretary of Administration, 613 N.E.2d 95 (Mass. 1993) . . . . . *passim*

TABLE OF AUTHORITIES — Continued

Pages

American Trucking Associations, Inc. v. Secretary of State, 595 A.2d 1014 (Me. 1991) 1, 2, 12

American Trucking Associations, Inc. v. Secretary of State, No. CV-89-410 (Me. 1990) 3

American Trucking Associations, Inc. v. Smith, No. 89-0385 (Ark. Chancery Ct., 1992) 3

American Trucking Associations, Inc. v. Cowan, No.TX91-01608 (Ariz. Chancery Ct., 1992) 2

American Trucking Associations, Inc. v. State, 556 N.W. 2d 761 (Wis. Ct. App. 1996) rev. denied, 560 N.W.2d 274 (Wis. 1996) 2

Armco Inc. v. Hardesty, 467 U.S. 638 (1984) 20

Black Beauty Trucking, Inc. v. Indiana Dept. of Revenue, 527 N.E. 2d 1163 (Ind. Tax Ct. 1988) 2

Capitol Greyhound Lines v. Bryce, 339 U.S. 542 (1950) 13

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 9,12,14,16

Commonwealth Transportation Cabinet v. American Trucking Associations, Inc., 746 S.W.2d 65 (Ky. 1988) 3

Complete Auto Transit v. Brady, 430 U.S. 274 (1977) 12,14,17,18

Covell v. City of Seattle, 127 Wash. 2d 874, P.2d 324 (1995) 10

Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) 8

TABLE OF AUTHORITIES — Continued

Pages

Fair Assessment in Real Estate Association, Inc., 454 U.S. 100 (1981) 7

Fairbank v. United States, 181 U.S. 283 (1901) 12

Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974) 6

Head Money Cases, 112 U.S. 580 (1884) 6

In re Jenny Lynn Mining Co., 780 F.2d 585 (6th Cir. 1986) 7

Interstate Towing Ass'n v. Cincinnati, 6 F.3d 1154 (6th Cir. 1993) 11

Kentucky v. American Trucking Associations, Inc., 746 S.W. 2d 65 (Ky. 1988) 2

Marx v. American Trucking Associations, Inc., 600 So. 2d 212 (Miss. 1992) 3

Massachusetts v. United States, 435 U.S. 444 (1978) 6, 7

National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 6, 8

Pace v. Burgess, 92 U.S. 372 (1876) 6

Perez v. Ledesma, 401 U.S. 82 (1971) 8

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 19, 20

Rosewell v. La Salle National Bank, 450 U.S. 503 (1981) 8

San Juan Cellular Phone Co. v. Public Service Comm'n, 967 F.2d 683 (1st Cir. 1992) 7, 8

Turpin v. Burgess, 117 U.S. 504 (1886) 6

TABLE OF AUTHORITIES — Continued

Pages

Union Pacific Railroad Co. v. Public Utility Comm'n, 899 F.2d 854 (9th Cir. 1990) 11

United States Shoe Corp. v. United States, 118 S. Ct. 1290 (1998) 6, 7, 8, 9

United States v. Sperry Corp., 493 U.S. 52 (1989) 6

V-1 Oil Co. v. Utah State Dept. of Public Safety, 131 F.3d 1415 (10th Cir. 1997) 11

Westlake Transportation, Inc. v. Michigan Public Service Commission, No. 95-15628-CM (Mich. Ct. Cl., October 13, 1995), appeal docketed, No. 216090 (Mich. App. Ct., Dec. 3, 1998) 2, 5

Statutes and Regulations

31 U.S.C. § 483a 8
31 U.S.C. § 583a 10
31 U.S.C. § 9701 6
49 U.S.C. § 1103(b) 7
Ark. Code Ann. § 26-55-708 (2) 3
Ark. Code. Ann. §§ 75-817 and 75-819 3
Ariz. Rev. Stat. §§ 28-2421 and 28-2422 3
Ariz. Rev. Stat. § 28-3005 3
Ind. Code § 6-6-8-1 3
Ky. Rev. Stat. Ann. § 1388.660(4-7) 3
N.H. Rev. Stat. Ann. § 147-A:6, II 2
N.H. Rev. Stat. Ann. § 21-P:20, IV 3
N.H. Rev. Stat. Ann. § 260:52, V (Supp. 1988) 3
N.J.S.A. 13:1E-18(a) 3
N.J.S.A. § 54:39A-10 3
Mass. Gen. Laws ch. 21C, § 7 3
Mass. Gen. Laws ch. 62C, § 67 3
Md. Ann. Code art. 81, § 423(a) 3
Me. Rev. Stat. Ann. tit. 29 § 246-A 3
Me. Rev. Stat. Ann. tit. 29 § 246-D 3
Mich. Comp. Laws 478.2(2) 2
Minn. Stat. § 221.31 3
Miss. Code Ann. § 27-61-5(1) 3
Miss. Code Ann. § 77-7-119 3

TABLE OF AUTHORITIES — Continued

Pages

Vt. Stat. Ann. tit. 23 § 3007 (1982) 3
Vt. Stat. Ann. tit. 23 § 415 (1982) 3
Wis. Admin. Code § SERB 4.03(2)(a)-(e) 2

Miscellaneous

Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation,"* 87 MICH. L. REV. 138 (1988) 10, 11

Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253 (1940) 13

U.S. Department of Transportation, *Highway Statistics 1997*, IV-5 - IV-6 (1997) 18

INTEREST OF THE *AMICUS CURIAE*

American Trucking Associations, Inc. (ATA), is a national trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry.[1] That industry consists of every type of motor carrier operation in the United States and includes tens of thousands of interstate for-hire carriers, private carriers, and leasing companies.

The interstate trucking industry traditionally has been one of the principal targets of discriminatory state taxation and regulation. As a result, ATA and its members have brought or participated in Commerce Clause challenges to a wide range of state taxes, fees, and regulations before this Court and other state and federal courts. Indeed, ATA was the lead plaintiff (appellant before this Court) in the case whose principles are most directly at issue in this appeal (*American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987) ("*Scheiner*")), and it has often litigated the identical "tax vs. fee" issue raised in this matter. *E.g.*, *American Trucking Associations, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991) ("*Secretary of State*"); *American Trucking Associations, Inc. v. Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993) ("*Secretary of Administration*"); *American Trucking Associations, Inc. v. New Jersey*, No. 011562-92 (N.J. Tax Ct. March 23, 1998), *appeal docketed*, No. A-6334-97T3F (N.J. Super. Ct., App. Div. July 15, 1998).

Moreover, despite ATA's and others' strenuous efforts to enforce *Scheiner*'s Commerce Clause standards, states and localities persist in imposing unapportioned, annual charges on interstate trucking operations. These governmental entities argue that the discriminatory and burdensome structure of these charges should be ignored on the ground that the charges involved are not taxes but

---

[1] Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus* or its members, made a monetary contribution to the preparation or submission of this brief.

"regulatory fees." ATA accordingly has a strong interest in the question presented by this case — whether the Commerce Clause's fair apportionment requirement ceases to apply to an exaction merely because the levy may be characterized as a regulatory fee.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

Following this Court's *Scheiner* decision in 1987, ATA hoped that states would recognize the decision's unequivocal condemnation of flat, annual charges on interstate trucking operations and quickly eliminate them. Instead, most states tried to evade *Scheiner's* principles and forced ATA to undertake an ongoing, decade-long litigation effort to enforce the Commerce Clause requirements that *Scheiner* articulated. *See, e.g., Kentucky v. American Trucking Associations, Inc.*, 746 S.W. 2d 65 (Ky. 1988); *Black Beauty Trucking, Inc. v. Indiana Dept. of Revenue*, 527 N.E. 2d 1163 (Ind. Tax Ct. 1988) ("*Black Beauty*"); *Secretary of State*, 595 A.2d 1014 (Me. 1991); *American Trucking Associations, Inc. v. State*, 556 N.W. 2d 761 (Wis. Ct. App. 1996), rev. denied, 560 N.W.2d 274 (Wis. 1996) ("*State*). All told, ATA has been forced to bring suit against 15 states challenging more than two dozen flat state taxes and fees imposed on interstate trucking.[2]

---

[2] *American Trucking Associations, Inc. v. New Jersey*, No. 011562-92 (N.J. Tax Ct. March 23, 1998), *appeal docketed*, No. A-6334-97T3F (N.J. Super. Ct., App. Div. July 15, 1998) ($212-per-unit hazardous waste transporter fee) (N.J. Stat. Ann. § 13:1E-18); *American Trucking Associations, Inc. v. State*, 556 N.W. 2d 761 (Wis. Ct. App. 1996), rev. denied, 560 N.W.2d 274 (Wisc. 1996) ($400-per-company hazardous material transportation fee) (Wis. Admin. Code § SERB 4.03(2)(a)-(e)); *Westlake Transportation, Inc. v. Michigan Public Service Commission*, No. 95-15628-CM (Mich. Ct. Cl., October 13, 1995), appeal docketed, No. 216090 (Mich. App. Ct., Dec. 3, 1998) ($100-per-truck intrastate operating fee (Mich. Comp. Laws 478.2(1)) and $100-per-vehicle flat annual interstate registration fee (Mich. Comp. Laws 478.2(2)); *American Trucking Associations, Inc. v. New Hampshire*, No. 89-E-00405-B (N.H. Super. Ct., Merrimack Co., 1995) ($200-per-unit hazardous waste transporter fee (N.H. Rev. Stat. Ann. § 147-A:6, II) and $25-per-unit

hazardous material fee (reduced to $5-per-truck during the litigation) (N.H. Rev. Stat. Ann. § 21-P:20, IV)); *American Trucking Associations, Inc. v. Denn*, No. C2-95-4910 (Dist. Ct., Ramsey Cty., 1995) ($40-per-vehicle cab card fee (Minn. Stat. § 221.31)); *American Trucking Associations, Inc. v. New Jersey*, No. 001601 (N.J. Tax Ct., filed Feb. 17, 1994) (flat-per-company hazardous waste transporter business disclosure fee (N.J. Stat. Ann. §§ 13:1E-18 and 13:1E-126 et seq.)); *American Trucking Associations, Inc. v. Secretary of Admin.*, 613 N.E. 2d 95 (Mass. 1993) ($7-per-truck license fee and $7-per-truck "user of special fuels" license fee (Mass. Gen. Laws ch. 62C, § 67) and $200-per-truck hazardous waste carrier fee (Mass. Gen. Laws ch. 21C, § 7)); *American Trucking Associations, Inc. v. Smith*, No. 89-0385 (Ark. Chancery Ct., 1992) ($10-per-truck fuel decal tax (Ark. Code Ann. § 26-55-708 (2)); *American Trucking Associations, Inc. v. Cowan*, No.TX91-01608 (Ariz. Chancery Ct., 1992) ($125-per-truck cargo tank fee (Ariz. Rev. Stat. § 28-3005) and $100-per-carrier, $25-per-truck hazardous and special waste transporter fees (Ariz. Rev. Stat. §§ 28-2421 and 28-2422)); *Marx v. American Trucking Associations, Inc.*, 600 So. 2d 212 (Miss. 1992) ($12-per-truck fuel identification fee (Miss. Code Ann. § 27-61-5(1)) and $13-per-truck bingo stamp fee (Miss. Code Ann. § 77-7-119)); *American Trucking Associations, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991) ($25-per-truck hazardous waste fee (Me. Rev. Stat. Ann. tit. 29 § 246-D)); *American Trucking Associations, Inc. v. New Hampshire*, No. 89-E-00405 (N.H. Super. Ct., Merrimack Co., 1991) ($20-per-truck decal fee (N.H. Rev. Stat. Ann. § 260:52, V (Supp. 1988))); *American Trucking Associations, Inc. v. Secretary of State*, No. CV-89-410 (Me. 1990) ($15-per-truck decal fee (Me. Rev. Stat. Ann. tit. 29 § 246-A)); *American Trucking Associations, Inc. v. Conway*, 566 A.2d 1323 (Vt. 1989) ($50-per-truck fuel decal fee (23 Vt. Stat. Ann. tit. 23 § 415 (1982)) and $50-per-truck retaliatory fee (Vt. Stat. Ann. tit. 23 § 3007 (1982))); *American Trucking Associations, Inc. v. Goldstein*, 541 A.2d 955 (Md. 1988) ($25-per-truck fuel decal fee (Md. Ann. Code art. 81, § 423(a)(1987 Cum. Supp.))); *Commonwealth Transportation Cabinet v. American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988) ($150-per-truck supplemental highway use tax (Ky. Rev. Stat. Ann. § 1388.660(4-7)); *American Trucking Associations, Inc. v. Gray*, 746 S.W.2d 377 (Ark. 1988) ($175-per-truck highway use equalization tax (Ark. Code. Ann. §§ 75-817 and 75-819)); *Black Beauty Trucking, Inc. v. Indiana Dept. of Revenue*, 527 N.E.2d 1163 (Ind.Tax Ct., 1988) ($50-per-truck supplemental highway use tax (Ind. Code § 6-6-8-1 et seq.); *American Trucking Associations, Inc. v. Kline*, 9 N.J.Tax 631 (N.J., 1987) ($25-per-truck fuel

In those cases, states have attempted to exploit every ambiguity in *Scheiner*. For example, states have contended that the decision applies only to situations where a state, by means of other tax reductions, exempts local interests from the impact of the flat charge — a blatant mischaracterization of *Scheiner*'s scope. *See* 483 U.S. at 273-75.[3] And states have attempted, as in this case, to circumvent *Scheiner*'s apportionment requirement by arguing that the decision applies only to taxes and not fees.

The "tax versus fee" argument has, therefore, been expressly considered by courts in ATA cases. Rejecting the argument, the Supreme Judicial Court of Massachusetts found that "[i]t is of no relevance what label is attached to the assessment imposed by a State if it actually discriminates against interstate commerce." *Secretary of Administration*, 613 N.E.2d at 99 n. 9. Likewise, the Supreme Judicial Court of Maine held that "a tariff such as the one imposed here is forbidden if it produces the prohibited discriminatory effects on interstate commerce, whether designated as a 'fee' or a general revenue 'tax.'" *Secretary of State*, 595 A.2d at 1016. Accordingly, the decision below directly conflicts with the decisions of the highest courts of two states, and review by this Court is needed to settle the standard of Commerce Clause review governing "fees" that affect interstate commercial activities.

Moreover, the issue of the appropriate Commerce Clause standard to be applied to "fees" is now pending in two cases challenging impositions by the State of New Jersey. In a challenge to a $212-per-unit annual hazardous waste transporter fee (which, like the Washington fee, funds, in part, roadside safety inspections), the New Jersey Tax Court rejected the State's claim

---

decal fee (N.J. Stat. Ann. § 54:39A-10)).

[3] As Petitioners note (Pet. at 26), states have also argued that apportionment was impracticable, that it was inappropriate because the charge involved was not for highway maintenance or construction, and that their charge, as a "user fee," need not be apportioned. *See e.g. State*, 566 N.W. 2d at 767-68; *Secretary of State*, 595 A.2d at 1016; *Secretary of Administration*, 613 N.E.2d at 101-03.

that the charge was a regulatory fee that need not be apportioned. The Court held that "[i]t is irrelevant whether I call the transporter fees fees or taxes under Commerce Clause jurisprudence. It is clear in *Scheiner* that the United States Supreme Court looked not at the formal designation or character of a state imposition as being a 'fee or tax,' but instead to the affect of that imposition on interstate commerce . . ." *American Trucking Associations, Inc. v. New Jersey*, No. 011562-92 (N.J. Tax Ct. March 23, 1998) appeal docketed, No. A-6334-97T3F (N.J. Super. Ct., App. Div. July 15, 1998).

An identical "tax versus fee" issue is pending in a concurrent challenge to New Jersey's flat, annual per-company hazardous waste transporter business disclosure fee (N.J.S.A. 13:1E-18(a)). *American Trucking Associations, Inc. v. New Jersey*, No. 001601-94 (N.J. Tax Ct.). And recently, the Michigan Court of Claims rejected an ATA challenge to a $100-per-truck intrastate regulatory fee that affects interstate commerce, expressing the view that state regulation of safety standards "is not amenable to a fee structure based on apportionment by usage." *Westlake Transportation, Inc. v. Michigan Public Service Commission*, No. 95-15628-CM (Mich. Ct. Cl., (Oct. 13, 1998)), appeal docketed, No. 216090 (Mich. App. Ct., Dec. 3, 1998). Consequently, the case below presents a substantial, recurring legal issue that demands this Court's attention.

Finally, many other substantial flat, annual charges, which are not subject to current challenge, are being imposed on interstate trucking operations (and other interstate businesses). *See* Petition at 24 n. 17. Without guidance from this Court on the "tax versus fee" issue, the chances of eliminating those discriminatory charges, without years of costly litigation, will be slim. Indeed, given the recalcitrant attitude that many states have taken regarding flat, annual taxes and fees, it can be reasonably expected that those states will be emboldened by the decision below to enact new flat, annual "fees" on the interstate trucking industry and other interstate businesses. States have a powerful incentive to utilize flat charges to export an unfair portion of their tax burden to out-of-state interests; in *Scheiner* (483 U.S. at 276), the Court recognized that the flat charges effectively cost interstate highway users five times as much as local users. It is again, therefore, critically important

that this Court clarify the Commerce Clause standards applicable to state "fees" to prevent further mischief in this area.

I. LOWER COURTS NEED GUIDANCE ON THE RELEVANCE AND APPLICATION OF THE "TAX VERSUS FEE" DISTINCTION

Whether a particular exaction constitutes a "tax" or a "fee" is a recurring question that arises in a wide variety of contexts. For example, this Court recently had to determine whether the federal Harbor Maintenance Tax, as it applies to exports, constituted a tax prohibited by the Export Clause of the Constitution (U.S. Const. art. I, § 9, cl. 5), or a fee that fell outside the constitutional prohibition. *United States Shoe Corp. v. United States*, 118 S. Ct. 1290 (1998); *see also Turpin v. Burgess*, 117 U.S. 504 (1886); *Pace v. Burgess*, 92 U.S. 372 (1876). Similarly, the Court has had to determine whether charges by federal agencies are authorized fees for benefits granted[4] or are in substance taxes that Congress can impose only by the exercise of its taxing power. *Federal Power Commission v. New England Power Co.*, 415 U.S. 345 (1974); *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974). It has had to determine whether federal registration fees imposed on civil aircraft constituted taxes that arguably violated the states' constitutional immunity from federal taxation, or were reasonable user fees that were not barred by that doctrine. *Massachusetts v. United States*, 435 U.S. 444 (1978). And, over a century ago, the Court had to determine whether per-passenger charges on those transporting immigrants into the country constituted an allegedly nonuniform exercise of the federal taxing power, see U.S. Const. art. I, § 8, cl. 1, or a fee for services rendered that was not subject to the constitutional restraint on that power. *Head Money Cases*, 112 U.S. 580 (1884). *Cf. United States v. Sperry Corp.*, 493 U.S. 52 (1989) (distinguishing charges that constitute governmental takings under Due Process Clause from reasonable user fees).

---

[4] See 31 U.S.C. § 9701 (delegating to administrative agencies the authority to assess charges in situations where a "service or thing of value" is provided by the agency).

Other courts have addressed similar questions in yet other contexts. *See, e.g., San Juan Cellular Phone Co. v. Public Service Comm'n*, 967 F.2d 683 (1st Cir. 1992) (Breyer, J.) (determining whether an exaction is a tax, which may not be challenged in federal court under the anti-tax injunction act, or a fee, which may be so challenged); *Union Pacific Railroad Co. v. Public Utility Comm'n*, 899 F.2d 854 (9th Cir. 1990) (determining whether a levy is a tax subject to the antidiscrimination provisions of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 1103(b), or a fee not subject to the Act's antidiscrimination provisions); *In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir. 1986) (determining whether a levy is a tax subject to priority in bankruptcy proceedings or a fee not entitled to such priority).

In each of these cases, even though the question is nominally the same—whether the particular exaction at issue is a tax or a fee—the underlying reasons for (and the legal consequences of) characterizing the exaction as a tax or a fee are often quite different and unrelated to one another. Thus, the characterization of an exaction as a tax rather than a fee resolves such disparate questions as whether the exaction should be subject to constitutional restraints on federal taxation of exports (*United States Shoe*); whether the exaction constitutes an impermissible levy by the Federal Government on the states (*Massachusetts*); whether the exaction must conform to constitutional uniformity principles (*Head Taxes*); whether the exaction may be challenged in federal court (*San Juan Cellular*); and whether the exaction is subject to priority in bankruptcy proceedings (*Jenny Lynn Mining*).

Because each of these inquiries is informed by different constitutional and statutory provisions and the discrete policies underlying them, it would be surprising if the line drawn between a tax and fee in one context would provide controlling or even meaningful guidance to the appropriate line, if any, between a tax and a fee in another context. For example, the policies underlying the tax injunction act—to prevent federal interference with the lifeblood of state government (see *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981))—have little to do with the policies underlying the limited statutory grant to federal

agencies to assess charges that provide "'value to the recipient.'" *National Cable*, 415 U.S. at 341 (quoting 31 U.S.C. § 483a).

As Justice Breyer observed when he was sitting on the First Circuit, in rejecting the argument that an exaction that does not provide individual "value to the recipient" must be deemed a tax for all purposes:

> Deciding whether (or to what extent) a particular fee provides such individual value could make sense in the context of such a statute.
>
> Here, however we are dealing with a very different statute, a "tax injunction" statute, which has as its objective to prevent a taxpayer from "throwing" state "tax administration . . . into disarray" as the taxpayer tries to "escape . . . ordinary procedural requirements" by going to federal court for an injunction, perhaps thereby "damaging" the "State's budget" and "shifting to the State . . . the risk of taxpayer insolvency." Whether a particular agency charge defrays the administrative costs of regulating a single regulated firm or a class of such firms has little, or nothing, to do with this problem. Hence, the Court's limiting language in *National Cable* is irrelevant here.

San Juan Cellular, 967 F.2d at 10-11 (ellipses in original) (quoting *Rosewell v. La Salle National Bank*, 450 U.S. 503, 527 (1981) (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 (1971) (Brennan, J., concurring in part and dissenting part))) (additional citation omitted).

This Court has likewise recognized that the question whether an exaction should be considered as a tax or fee for constitutional or other purposes is an inquiry that depends on the context in which the question arises, and that the lines drawn in one context do not determine the lines drawn in another. Thus in *United States Shoe*, which involved the question whether an exaction was a tax for purposes of the limitation on federal taxation of exports, the Court distinguished cases that had drawn a line between taxes and fees under the Takings Clause (*Sperry*), the intergovernmental immunity doctrine (*Massachusetts*), and the Commerce Clause (*Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405

U.S. 707 (1972))[5]: "Those decisions involved constitutional provisions other than the Export Clause . . . and thus do not govern here." *United States Shoe*, 118 S. Ct. at 1295.

The Washington Supreme Court utterly ignored the context-specific nature of the "tax versus fee" inquiry, and the necessity of identifying the constitutional or statutory concerns at stake, in mechanically determining that the exaction at issue was a "regulatory fee" and, "therefore" (according to the court) not subject to the Commerce Clause requirement that taxes be fairly apportioned and internally consistent. Pet. App. at 10a-16a. The court relied on cases arising under a variety of disparate and unrelated provisions in concluding that the exaction constituted a "regulatory fee" that was insulated from the Court's Commerce Clause jurisprudence applicable to state taxing measures. See Pet. App. at 11a-12a (discussing *Union Pacific*, arising under the Railroad Revitalization and Regulatory Reform Act); Pet. App. at

---

[5] It is worth observing that, in the Commerce Clause context, the only distinction the Court has ever drawn between a tax and fee is a distinction between general revenue measures, on the one hand, and user fees, on the other, and then only to point out that user fees are subjected to a *greater* degree of constitutional scrutiny than are general revenue measures. As the Court observed in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), with regard to "'user' fees or 'taxes' that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services" (*id.* at 621):

> "[s]uch imposition although termed a tax, cannot be tested by standards which generally determine the validity of taxes." Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific, quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees charged do not appear to be manifestly disproportionate to the services rendered . . . ."

Id. at 622 n.12 (citation omitted; ellipses in original). There is no suggestion here that the exaction at issue is a user charge in the sense employed by the Court. Moreover, even if it were, it would expose the charge to increased — not lesser — constitutional scrutiny, as the court below suggested.

12a (discussing *National Cable*, arising under the Independent Offices Appropriation Act, 31 U.S.C. § 583a); Pet. App. at 12a-13a (discussing *Covell v. City of Seattle*, 127 Wash. 2d 874, 905 P.2d 324 (1995), arising under the Washington State constitutional requirement of uniformity and equality in property taxation).

The court below therefore failed to pay attention to the rationale, if any, for excluding the exaction at issue from Commerce Clause scrutiny applicable to taxes. The court's failure in this regard is most dramatically illustrated by its heavy reliance on the distinction purportedly drawn between taxes and fees in Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation,"* 87 MICH. L. REV. 138 (1988). The court declared that the article:

> identified "professional and similar licensing fees that are imposed by every state" as possible victims of strict application of internal consistency to nondiscriminatory regulatory fees.
>
> > Many of these fees are flat and unapportioned, and, for that reason, could be challenged under the "internal consistency" rationale. . . . One feature of these licensing fees, however, arguably insulates them from challenge under the "internal consistency" doctrine. In contrast to . . . exactions . . . presumed to be imposed for general revenue purposes pursuant to the state's taxing power, the levies considered here are presumed to be imposed for regulatory purposes pursuant to the state's police power. However thin that distinction may be in some cases, it is a distinction the law recognizes, and the question for present purposes is whether it is a distinction that makes a constitutional difference insofar as the commerce clause (and "internal consistency") analysis is concerned.

Pet. App. at 16a (quoting Hellerstein, *supra*, 87 MICH. L. REV. at 156 (omission of footnotes and ellipses in original)).

While the court relies on the distinction the article identifies between exactions imposed for general revenue purposes and levies imposed for regulatory purposes in support of its conclusion that the latter need not satisfy the "internal consistency" test, *it*

completely ignores the article's analysis of the issue, which flatly contradicts the court's conclusion. In answering the question posed — whether the "tax versus fee" distinction is one that "makes a constitutional difference insofar as the commerce clause (and 'internal consistency') analysis is concerned" — the article declares:

> Although the Court's formal criteria for evaluating commerce clause challenges to state regulations are not identical to its criteria for evaluating commerce clause challenges to state taxation, *there is no reason to believe that a regulatory license fee would be immune from the "internal consistency" requirement merely because it constituted an exercise of the regulatory power rather than an exercise of the state's taxing power.* Surely the evils that the "internal consistency" test was designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power. In each case, the licensee carrying on his trade in more than one jurisdiction bears a greater financial burden than his intrastate competitor merely because he is engaging in interstate commerce with the consequent interference with free trade among the states. *Hence, there does not appear to be any sound policy basis for distinguishing the "fee" from the "tax" cases insofar as the application of the "internal consistency" doctrine is concerned.*

Hellerstein, *supra*, 87 MICH. L. REV. at 157 (emphasis supplied; footnote omitted). In short, rather than supporting the court's conclusion, the article's analysis demonstrates that there is no sound basis for declining to apply the Commerce Clause's fair apportionment requirement, and its related "internal consistency" test, to the "regulatory fee" at issue here.

The Washington Supreme Court is not alone in its misguided reliance on cases from other contexts to resolve the question whether the Commerce Clause restraints imposed on state taxes apply to exactions that may be characterized as "regulatory fees." *See, e.g., V-1 Oil Co. v. Utah State Dept. of Public Safety*, 131 F.3d 1415 (10th Cir. 1997) (relying on unrelated state law precedents in holding that an exaction should be analyzed as a "regulation" rather than a "tax" under the Commerce Clause); *Interstate Towing Ass'n v. Cincinnati*, 6 F.3d 1154 (6th Cir. 1993)

(same). Moreover, the Washington decision is in conflict with decisions of other courts that have properly recognized the irrelevance of the tax-regulatory fee dichotomy for purposes of analyzing whether a flat, annual charge on interstate trucks violates the Commerce Clause. *See, e.g., Secretary of Administration*; *Secretary of State*.

Consequently, this Court's guidance is sorely needed to assure that the question whether an exaction is subject to the restraints that the Commerce Clause imposes on the exercise of state tax power is resolved in light of the principles that underlie the Court's Commerce Clause jurisprudence and not by reference to cases from other, unrelated contexts. Courts need to be reminded, as this Court observed many years ago, that "we must regard things rather than names" (*Fairbank v. United States*, 181 U.S. 283, 304 (1901)), in undertaking the constitutional analysis.

II. THE COMMERCE CLAUSE'S FAIR APPORTIONMENT REQUIREMENT APPLIES EQUALLY TO TAXES AND FEES

A. The Validity of a State Charge Under the Commerce Clause is Based Upon its Practical Effect on Interstate Commerce

In recent decades, this Court has adjudicated virtually every Commerce Clause challenge to a state charge (whether denominated a tax or a fee) under the four-prong analysis of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (a charge will pass muster only if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.").

In applying *Complete Auto*'s analysis, this Court has also made clear that "the permissibility of state taxation [is] based upon its actual effect rather than its legal terminology" (*id.* 439 U.S. at 281), noting that "a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Id.* at 288. *See also Commonwealth Edison*, 453 U.S. at 616 ("In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry'

focusing on 'the practical effect of a challenged tax.'") (citations omitted).

It is beyond dispute that flat, annual charges have the same impact on interstate motor carriers (and on other interstate businesses) no matter what the charges are denominated. This is so because the level of the fee is "not keyed to the interstate truckers' actual use of State highways, facilities, or services." *Secretary of Administration*, 613 N.E. 2d at 100. Consequently, "an interstate carrier will be subject to the [flat] taxes of several States, even though his entire use of the [States'] highways[,] [services, or facilities] is not significantly greater than that of intrastate operators who are subject to only one [flat] tax." *Scheiner*, 483 U.S. at 292 (quoting *Capitol Greyhound Lines v. Bryce*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)). This is true, of course, no matter what a state charge is called and no matter what the uses to which the state puts the charge's proceeds.

For example, whether called a regulatory fee, a highway user tax or fee, or a general revenue tax, a flat, annual $50 per-truck charge costs an interstate trucker as much as $2,450 (to operate in the 48 contiguous states and the District of Columbia), while costing a purely intrastate trucker only $50. This is so even though the two trucks' level of operations are identical. This "cumulative effect does not result from the mileage or distance traveled, but from the interstate character of the journey." *Scheiner*, 483 U.S. at 284 n.16 (quoting Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253, 1269 (1940)).

The result of this cumulative burden is that some entities engaged in interstate commerce will be forced to draw back from full participation in the interstate market. In *Scheiner*, the Court observed that flat, annual charges have a "forbidden impact on interstate commerce because [they] [] exert[] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Scheiner*, 483 U.S. at 286-87. Consequently, flat annual charges of all sorts do not "maintain state boundaries as a neutral factor in [a taxpayer's] economic decisionmaking" (*id.* at 283). Such charges therefore offend the Commerce Clause.

Moreover, any type of unapportioned annual charge "'bear[s] more heavily in the aggregate on a firm that [does business] in many places than on a firm otherwise identical . . . that [does business] in only one place.'" *Scheiner*, 483 U.S. 285 n.20 (citation omitted). As this Court explained in *Scheiner*, "in the general average of instances, the privilege is not as valuable to the interstate carriers" because "the very nature of the market that interstate operators serve prevents them from making full use of the privilege of doing business for which they have paid the State." *Id.* at 284 n.16, 291. Consequently, interstate motor carriers and other interstate businesses, under any type of a flat annual charge, inherently pay more than their fair share of a state's costs. *See Scheiner*, 483 U.S. at 296 ("[I]mposition of [a] flat tax[] for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause.").

Finally, it is also indisputable that any type of flat charge fails *Complete Auto*'s fourth prong requirement that taxes be "fairly related to services provided by the state." *Complete Auto*, 430 U.S. at 279. With respect to taxes, this requirement has been interpreted to require that "the measure of the tax must be reasonably related to the extent of the [taxpayer's] contact, since it is the activities or presence of the taxpayer in the State that may be properly made to bear a just 'share of state tax burden.'" *Commonwealth Edison,* 453 U.S. at 626. When taxes "are assessed in proportion to a taxpayer's activities or presence in a State, [a] taxpayer is shouldering its fair share" of the state's tax burden. *Id.* at 627. Conversely, "'when the measure of a tax bears no relation to the taxpayer's presence or activities in a State, a court may properly conclude . . . that the State is imposing an undue burden on interstate commerce.'" *Scheiner,* 483 U.S. at 291 (quoting *Commonwealth Edison*, 453 U.S. at 629.) Indeed, as we have noted (at note 5, *supra*), under the fourth prong fees are subject to an even more demanding Commerce Clause analysis than are general revenue taxes.

In practice, unapportioned annual charges, whether labeled a tax or a fee, expose interstate motor carriers (and other forms of interstate business) to duplicative taxation. Such levies also inherently place a disproportionate and discriminatory share of a

state's tax or regulatory cost on out-of-state taxpayers. Such flat charges therefore unquestionably violate the Commerce Clause.

B. Because the Practical Effect of Flat Taxes and Fees Under the Commerce Clause is the Same, There is no Basis for Applying a Different Legal Analysis

Before allowing a state to impose a flat, annual charge that inherently discriminates against and burdens interstate commerce, it would be reasonable to expect some explanation as to why such a charge was appropriate in the context of a "regulatory" or "user" fee — an explanation, that is, of what is it about a regulatory or user fee that makes a flat charge any less discriminatory or burdensome, less of a threat to the free movement of interstate commerce, or more difficult to apportion than a general revenue tax. But while the Supreme Court of Washington alludes to "policy reasons" that justify a different Commerce Clause standard for regulatory fees, it never explains those reasons. Instead, it speculates that applying an apportionment requirement could jeopardize other forms of flat state charges (Pet. App. at 15a) and cites out-of-context cases holding that the burden on interstate commerce from "a direct tax" is "inherently greater" than from "police power regulations." *Id.* at 11a.

The Court's concern about the potential invalidation of all flat charges is simply wrong. Per-use flat charges, such as the enplaning fee in *Evansville*, or toll charges or head taxes, are self-apportioned (each use triggers a separate fee payment) and therefore do not violate the Commerce Clause. Such fees are "directly related, in purpose and amount, to the use of a service or privilege" (*Secretary of Administration*, 613 N.E.2d at 102), making each feepayer's payment equivalent to the approximate value of the services received from the state. Likewise, flat administrative fees also would not offend the Commerce Clause when they simply recoup the state's true administrative cost of doing a particular administrative task (*e.g.*, fees for processing a license application). Under a true administrative fee, the state's cost would be the same for each feepayer, would not vary with the level of a feepayer's activity in the state, and would be in an amount appropriate to provide compensation for an identifiable, specific administrative service.

Other flat, annual "fees" imposed to reimburse a state for generic costs of regulation or providing a service or facility must be apportioned to protect interstate commerce against potential multiple taxation. State regulatory programs or generic services whose costs vary with the level of a feepayer's in-state activity (*e.g.*, conducting random inspections) involve charges very much akin to general revenue taxes, a point that is discussed below. Feepayers in such circumstances simply contribute to the costs of a generic government program. As with general revenue taxes, the only fair way to distribute the cost of such programs is to apportion them according to the feepayer's level of activity or presence in the state. Consequently, the Washington court's supposition that regulatory fees do not as directly affect interstate commerce as do general revenue taxes is simply wrong. A $50 per-truck charge labeled a regulatory user fee is just as burdensome to interstate motor carriers and just as much a threat to interstate commerce as a $50 per-truck charge labeled a highway tax.

Finally, it is worth noting that apportioning a regulatory or user fee is no more difficult than apportioning a general revenue tax. In fact, it should be easier for a state to apportion a regulatory or user fee according to usage of state services or facilities than it is to apportion a general revenue tax that is imposed to recoup costs of general governmental benefits. *See Commonwealth Edison*, 453 U.S. at 623 (noting that a general revenue tax "is not an assessment of benefits"). In any event, apportionment is not based on identifying each cost imposed on a state by particular activities and then apportioning those costs to specific feepayers. Rather, apportionment is instead based on the level of activities or presence in the state of the taxpayer. *See id.* at 626 ("a tax [must be] reasonably related to the extent of the [taxpayer's] contact [with the taxing State], since it is the activities or presence of the taxpayer in the State that may properly be made to pay a 'just share of state tax burden.'") (citation omitted). It is no more difficult to apportion a fee (based on the extent of in-state activity) than it is a tax.

C. Separate Commerce Clause Standards for Fees and Taxes Would Needlessly Complicate Judicial Review, Leading to State Manipulation of Charges and Inconsistent Results

State exactions do not fall into neat, well-defined tax and fee categories. States impose many types of charges for many different purposes. Some charges are broad-based taxes that generate revenue for general governmental purposes (*e.g.*, personal and corporate income taxes, sales and use taxes). Others are more selective taxes that likewise generate revenue for general governmental purposes (*e.g.*, alcohol and tobacco taxes). Still others are selective charges (taxes and fees) that are earmarked for a particular governmental purpose (*e.g.*, highway use taxes earmarked for road construction and maintenance, regulatory fees earmarked for funding state regulatory services). And finally, there are per-use fees and administrative fees that are charges for individualized uses of specific state services or facilities (*e.g.*, tolls, administrative filing fees).

It is not always easy to determine exactly where a state charge falls along the "tax versus fee" continuum. For example, the charges reviewed in *Scheiner* (one denominated a tax and one a fee), were fees in the same sense as was the Washington per-truck charge at issue in this case. The *Scheiner* charges were imposed on truck owners to pay general highway costs incurred by the state because of the operation of their vehicles (*see Scheiner*, 483 U.S. at 270-71), while the Washington fees were imposed on truck owners to fund general state safety activities related to the operation of their trucks. Yet, although there is virtually no practical difference between the types of charges, the Washington Supreme Court categorized them differently and in a manner that ultimately controlled, according to that court, their constitutionality under the Commerce Clause.

Basing the validity under the Commerce Clause of a state exaction on its categorization rather than its practical effect would add a complicated layer of analysis to constitutional review. As this Court recognized in *Complete Auto*, such a formalistic view would "operate only as a rule of draftsmanship, and serve[] only to distract the courts and parties from their inquiry into whether the

challenged tax produced results forbidden by the Commerce Clause." *Complete Auto*, 430 U.S. at 285. Undoubtedly, courts would reach inconsistent conclusions on charges that imposed "no real economic difference" on the parties. *Id.* at 284. Whether a state charge is a tax or fee simply does "not address the problems with which the Commerce Clause is concerned." *Id.* at 288.

Moreover, such formalism invites states to attempt to manipulate the legal analysis. State legislatures are under pressure from local interests to export as much of their tax and regulatory cost burden as possible to out-of-state entities. Flat, annual charges are a proven tool for just such discrimination. If flat highway taxes are unconstitutional, but flat regulatory fees are permissible, it will be a simple matter for a state to break down a general highway tax into a number of so-called regulatory fees.

For example, highway taxes fund a variety of state activities, including capital outlays for road construction and improvements; maintenance costs to keep highways in a usable condition; highway and traffic service costs, such as traffic control devices, snow removal, and the like; administrative costs related to general highway planning and research; highway law enforcement and safety expenditures, including traffic supervision, vehicle inspection, and enforcement of size and weight limitations; debt service costs; and intergovernmental transfers for local road-related projects. U.S. Department of Transportation, *Highway Statistics 1997*, IV-5 – IV-6 (1997). It would not be difficult for a state to replace a flat unconstitutional general highway tax (*e.g.*, the Pennsylvania $36 per-axle tax or $25 marker fee) with a series of flat regulatory/user fees (a safety inspection fee, a hazardous material enforcement fee, a size and weight inspection fee, a rest area fee, a snow removal fee, and so on). Indisputably, the impact of such fees would be the same on interstate commerce as an identical exaction labeled a highway tax.

III. A *PIKE* ANALYSIS IS NOT APPROPRIATE FOR REGULATORY FEES

Even if the distinction between a tax and a "regulatory fee" were deemed to have some bearing on the standards for adjudicating the constitutionality of an exaction under the Commerce Clause, it does not follow, as the court below

concluded, that the appropriate standards are those stated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In *Pike*, this Court articulated the now-familiar balancing test that it has frequently applied to state statutes that *regulate* interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike, 397 U.S. at 142 (citations omitted).

On its face, the open-ended balancing test that has been used to determine the constitutionality of state *regulations* of interstate commerce has no application to fees that do not themselves have any regulatory content. No matter what the revenue they generate is used for, the "regulatory fees" at issue here do not function as regulations. The only thing that the fees require is that the truckers pay money to the state. There is simply no "putative local benefit"—the effect of a substantive regulation under the *Pike* test—to balance against the burden of the tax.[6]

Moreover, even if the *Pike* test were applicable to the exactions at issue here, it is plain that the court below misapplied it. Under *Pike*, a regulation must "regulate[] evenhandedly" (*i.e.*, be nondiscriminatory) before a court may "balance" the burden the regulation imposes against the benefit it provides. But the flat levy at issue here is clearly discriminatory. However one may characterize this levy (as a tax, a regulatory fee, or something

---

[6] In this respect, the regulatory fee at issue here is easily distinguishable from a fee that itself may function as a regulation, *e.g.*, a progressive fee calibrated to the amount of pollutants a feepayer discharges into the environment. Such a fee does not merely raise revenue; it also directly affects the level of pollutants discharged.

else), and whatever test of constitutionality may govern its validity, it is indisputable that the levy is unfairly apportioned. Indeed, the State conceded as much (see Pet. App. at 15a), contending instead that the fair apportionment requirement was inapplicable. But this Court has flatly stated that "[a] tax that unfairly apportions income from other States is a form of discrimination against interstate commerce." *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). It is therefore apparent that the flat levy at issue here cannot satisfy the threshold requirement of the *Pike* test because it is structurally discriminatory and thus not "evenhanded."

Furthermore, even if one overlooked the fact that flat levies by their very nature discriminate against interstate commerce, the levy at issue here would *still* flunk the *Pike* balancing test. Under *Pike*, no burden on interstate commerce will be tolerated if the state's purpose in the regulation can "be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. Here, of course, the State undeniably could fund its motor carrier safety enforcement program with a fairly apportioned levy. Hence a reasonable, nondiscriminatory alternative to the State's flat levy clearly exists. Accordingly, the Court's review of this case is needed to confine the *Pike* balancing test within its appropriate bounds and to assure that, within those bounds, the *Pike* analysis is properly construed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT DIGGES, JR.
ATA LITIGATION CENTER
2200 MILL ROAD
ALEXANDRIA, VA 22314
(703) 838-1889

WALTER HELLERSTEIN*
UNIVERSITY OF GEORGIA
LAW SCHOOL
ATHENS, GA 30602
(706) 542-5175

* *Counsel of Record*

MARCH 12, 1999

Supreme Court, U.S.
FILED
MAR 24 1999
CLERK

No. 98-1282

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANKS & SON, INC., on behalf of themselves and all others similarly situated
Petitioners,

v.

THE STATE OF WASHINGTON, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, AND OFFICE OF THE STATE TREASURER
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

PETITIONER'S REPLY BRIEF

JAMES H. HANSON
LYNNE D. LIDKE
ROBERT L. BROWNING
Scopelitis, Garvin, Light & Hanson, P.C.
10 West Market St.
Suite 1500
Indianapolis, IN 46204
(317) 637-1777

ANDREW L. FREY*
CHARLES ROTHFELD
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

* *Counsel of Record*

1158

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The Washington Tax Cannot Be Reconciled With Fundamental Commerce Principles 1

B. Fees Are Not Exempt From The Apportionment Requirement 2

C. The Lower Courts Are In Conflict On The Question Presented Here 6

D. The Issue Presented Here Is An Important And Recurring One 8

TABLE OF AUTHORITIES

Pages

Cases

Aloha Freightways, Inc. v. *Commissioner of Revenue*, 701 N.E.2d 961 (1998) 7

American Trucking Ass'ns, Inc. v. *Scheiner*, 483 U.S. 166 (1987) . . . . . *passim*

American Trucking Ass'ns, Inc. v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993) 6, 7

American Trucking Ass'ns v. *Secretary of State*, 595 A.2d 1014 (Me. 1991) 6

Clark v. *Poor*, 274 U.S. 554 (1927) 4

Clyde Mallory Lines v. *Alabama*, 296 U.S. 261 (1935) 4

Dean Milk Co. v. *City of Madison*, 340 U.S. 349 (1951) 4

Evansville-Vanderburgh Airport Auth. Dist. v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972) 3, 4

Government Suppliers Consolidating Servs., Inc. v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1993) 7

Northwest Airlines, Inc. v. *County of Kent*, 510 U.S. 355 (1994) 4

Oklahoma Tax Comm'n v. *Jefferson Lines, Inc.*, 514 U.S. 175 (1995) 2, 5

Sprout v. *South Bend*, 277 U.S. 163 (1928) 4

Miscellaneous

Hellerstein, *State Taxation of Interstate Business: Perspective on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37 (1987) 2

The State's brief demonstrates the areas of common ground between the parties in this case. The State *acknowledges* the scope of the decision below: as the State recognizes, the Washington Supreme Court held that an otherwise invalid flat tax may be rendered constitutional by the simple expedient of calling it a fee and using the revenues its collects to pay the costs associated with regulatory activity. At the same time, the State makes virtually no response to our argument that the holding below is flatly inconsistent with *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 166 (1987); it does not deny that the Washington regime imposes structural burdens on interstate commerce; and it implicitly recognizes that the issue presented here is a recurring one of great practical importance. In these circumstances, further review plainly is warranted.

A. The Washington Tax Cannot Be Reconciled With Fundamental Commerce Clause Principles

At the outset, and perhaps most fundamentally, the State does not even attempt to show that the decision below is consistent with the Commerce Clause principles applied in *Scheiner*. As we explained in the petition (at 6-12), flat taxes are unconstitutional because they impose cumulative burdens on interstate commerce, "plac[e] a financial barrier around the State," and do not "maintain state boundaries as a neutral factor in economic decisionmaking." *Id.* at 284, 283. We also showed (Pet. 13-18) that flat regulatory fees like the one imposed by Washington have precisely the same effect on interstate commerce as the flat general revenue taxes that the State concedes to be invalid, and that the fees accordingly cannot survive Commerce Clause scrutiny. The State makes *no response at all* to this point.

It therefore is no surprise that the State also makes no serious attempt to reconcile the holding below with *Scheiner*. It offers only one distinction of *Scheiner*: the claim that "the central issue in *Scheiner* was one of discrimination, not apportionment." Opp. 13. That argument, however, rests on a plain misreading of this Court's opinion. While the Court in *Scheiner* noted evidence that the Pennsylvania fee did in fact bear more heavily on interstate than on intrastate carriers (see 483 U.S. at 286-287, 296), that evidence was not essential to the Court's holding. To the contrary, the Court specifically held that, wholly apart from any evidence of discriminatory impact, the challenged fee was unconstitutional because it "exert[ed] an inexorable hydraulic

pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 286-287 (citation omitted). The lack of necessity for any factual demonstration of discriminatory operation is confirmed by *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995), which held that "[a] failure of internal consistency shows as a matter of law" that a tax is malapportioned. See also Hellerstein, *State Taxation of Interstate Business: Perspective on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37, 71 (1987) (emphasis added) (the Court in *Scheiner* relied on internal inconsistency as a ground for invalidating the flat tax).[1]

B. Fees Are Not Exempt From The Apportionment Requirement

In arguing that the holding below nevertheless is reconcilable with this Court's decisions, the State essentially ignores *Scheiner* and contends that special purpose fees should be accorded different treatment from general revenue taxes, asserting that "the distinction between 'taxes' and 'fees' has been a comfortable one in a variety of modern contexts." Opp. 10. The State has some difficulty, however, in explaining why that distinction should have any relevance in the Commerce Clause setting. Revealingly, the State does *not* defend the Washington Supreme Court's analysis, which turned on the proposition — an absurd one, in our view (see

---

[1] The State asserts that the Washington tax did not in fact discriminate between interstate and intrastate carriers and that the trial court so found. Opp. 9. While the question of discrimination is analytically distinct from the apportionment issue presented here, the State is incorrect on its own terms. As explained at Pet. 3-4 n.4, the trial court simply found that discrimination had not been established at the summary judgment stage. As for the merits of the State's repeated assertion that its levy does not discriminate against interstate commerce (*e.g.*, Opp. ii, 15), the State makes no response to this Court's observation that flat taxes *necessarily* discriminate because "'[i]n the general average of instances, the privilege [paid for by the levy] is not as valuable to the interstate as to the intrastate carrier.'" *Scheiner*, 483 U.S. at 291 (citation omitted). Obviously, when petitioner's trucks are operating in other states, they can hardly avail themselves of the privilege to operate in Washington, or indeed create a need for regulatory response by Washington to their activities.

Pet. 16-17) — that special purpose fees impose less of a burden on interstate commerce than do general revenue taxes. Instead, the State finally hits on the argument that flat special purpose fees are permissible, despite their cumulative impact on interstate businesses, because every "state[] has a right to protect its citizens from unsafe trucks and inspect the trucks on the way through [the State]." Opp. 15-16. This analysis is flawed on several levels.

First, as we note in the petition (at 17 n.12) and as *amicus* American Trucking Associations ("ATA") explains at greater length in its brief supporting certiorari (at 6-12), the fact that the distinction between general revenue taxes and special purpose fees is relevant for some purposes hardly means that it is controlling for all. Instead, whether that distinction has any bearing in a given context plainly should turn on the particular constitutional or statutory concerns at stake. And for the reasons noted above, nothing in the Commerce Clause justifies differing treatment for the two types of levies; they impose identical burdens on interstate commerce. Indeed, that proposition was settled by *Scheiner* itself, which invalidated a dedicated special purpose truck fee that was used to finance road-related expenditures and that was identical in all relevant respects to the Washington tax. Although we made that point in the petition (at 16), the State offers no response.[2]

Second, the State misunderstands the nature of the dedicated fees that have survived Commerce Clause attack. The Court has upheld per-use fees (like highway tolls) and other levies calibrated to charge for the value of services or benefits provided to the individual feepayer — but it has done so because such fees *are* properly apportioned and *do* pass the internal consistency test. The one-dollar airport enplaning fee at issue in *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), is an example. That fee did not impose commercial barriers around the taxing state because it "maintain[ed] state boundaries as a neutral factor in economic decisionmaking"

---

[2] The court below distinguished *Scheiner* on the ground that fees used to pay for regulatory activity are more burdensome than dedicated fees that are used for other purposes. As we note above, however, the State evidently has abandoned the state court's rationale. Having done that, the State has neglected to offer any other distinction of *Scheiner*.

(*Scheiner*, 483 U.S. at 283); if such a fee were imposed by every taxing jurisdiction in the Nation, the amount paid would vary according to the number of flights taken (whether interstate or intrastate), not the number of state boundaries crossed. The Court therefore held the levy constitutional, noting that the charge "'reflect[ed] a fair, if imperfect, approximation of the use of facilities for whose benefit [it is] imposed.'" *Id.* at 290 (quoting *Evansville-Vanderburgh*, 405 U.S. at 717).[3]

The Washington tax, however, was not of this character. While Washington asserts that its levy was "fairly related to the burdens placed on the state" (Opp. 15), it means by this statement that all fee revenues *in the aggregate* were used to pay for Washington's regulatory program; the State determined how much money it needed and then imposed a flat, annual tax that would raise the requisite amount. See Opp. 5. By definition, such a fee *cannot* reflect a reasonable approximation of the *individual feepayer's* use of state services. The State implicitly acknowledges (Opp. 15-16) the correctness of our argument that this sort of levy

---

[3] The fee at issue in *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355 (1994), cited by the State at Opp. 13-14, also involved a fee that was apportioned because it approximated the value of the services provided by the taxing jurisdiction to the feepayer. See 510 U.S. at 859 (feepayer charged "only for the cost of providing the particular facilities and services they use"). The older cases cited by the State (at Opp. 11-12) offer it no more support. *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935), for example, involved a per-use harbor fee whose reasonableness was not questioned. *Id.* at 263. *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 344-345 (1951), indicated only that the city could charge interstate businesses for the "actual and reasonable cost" of services provided to those businesses. And *Sprout* v. *South Bend*, 277 U.S. 163, 170 (1928), expressly noted that "[a] flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways." In any event, to the extent that any of these decisions are read to authorize flat taxes more broadly, they cannot survive *Scheiner*. Indeed, several of the cases cited by the State (*Clyde Mallory Lines*, 296 U.S. at 268, and *Sprout*, 277 U.S. at 169) relied upon *Clark* v. *Poor*, 274 U.S. 554 (1927), a decision that was specifically disapproved in *Scheiner*. See 483 U.S. at 292-297.

accordingly fails the internal consistency test and imposes disproportionate, cumulative burdens on interstate commerce, while allowing the taxing jurisdiction to export much of its tax burden to interstate taxpayers.

To be sure, the State is correct in observing (Opp. 15-17) that interstate businesses may be made to pay their own way. But they may not be made to pay the way of in-state businesses. Accordingly, in collecting from interstate businesses, a State may levy only the taxpayer's fair share — and as a matter of law, an unapportioned levy "attempt[s] to take *more* than its fair share of taxes from the interstate transaction." *Jefferson Lines*, 514 U.S. at 185 (emphasis added). In the setting of this case, Washington could have apportioned its levy by mileage, or by charging per safety inspection conducted, or by numbers of pickups and deliveries in the State, or by any other reasonable method that did not inherently expose the interstate trucker to duplicative assessments. Its failure to do so rendered its tax unconstitutional.[4]

In fact, the State's confusion about the import of *Scheiner* and related decisions demonstrates the importance of further review. Washington's approach, endorsed by the holding below, would gravely weaken *Scheiner*, offering States a roadmap for evading Commerce Clause principles. Nor can the State successfully minimize the radical scope of the holding below by asserting (Opp. 16-17) that our approach would strike down hunting licenses and analogous fees. Many such fees do not violate apportionment requirements because they are calibrated to charge each feepayer for the value of services provided, and others may be valid

---

[4] In this regard, the State's contention (Opp. 3, 4) that there are differences between interstate and intrastate carriers is beside the point. If such distinctions in fact exist, they would be taken into account by a properly apportioned tax (for example, one that was imposed per inspection conducted). But such distinctions would not justify disregarding the apportionment requirement and allowing the State to take more than its fair share of tax. For the same reason, the State's contention (Opp. 17) that apportionment would have intrastate carriers pay more than their fair share is wrong; by definition (not to mention by common sense), apportionment is necessary to assure that interstate carriers do not pay too much — and that intrastate businesses do not pay too *little*.

because they involve circumstances where apportionment is impracticable — and, of course, this Court has not in modern times upheld such fees when they are unapportioned. In any event, whatever the validity of such fees, the one thing that *is* clear is that levies on interstate transportation must be apportioned. The holding below cannot be reconciled with that rule.

C. The Lower Courts Are In Conflict On The Question Presented Here

The State errs in its assertion (Opp. 18-20) that the lower courts are not in conflict on the question presented here. The State correctly acknowledges that several courts have endorsed the analysis used by the Washington Supreme Court in this case. But its claim that no courts have rejected that approach is untenable.

The State attempts (Opp. 18-19) to distinguish *American Trucking Ass'ns* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991), on the ground that only a portion of the fee in that case was devoted to regulatory purposes, with the remainder used to defray other costs imposed upon Maine by the feepayers. See Pet. 20-21. But having abandoned the rationale that fees used for regulatory purposes are more burdensome than other dedicated fees, the State does not even attempt to demonstrate why this distinction makes any difference. The State also does not, and could not, explain how the holding below may be reconciled with the analysis used by the Maine court, which turned on the conclusion that a levy is unconstitutional, whether or not it is designated a "[r]egulatory [l]icense [f]ee," so long as it violates the internal consistency test. 595 A.2d at 1015, 1017.

As for *American Trucking Ass'ns, Inc.* v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993), the State asserts (Opp. 19) that the Massachusetts court relied on the conclusion that "'local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks,'" adding that no such finding has been made here. Opp. 19, quoting 613 N.E.2d at 101. In fact, the Massachusetts holding is in direct conflict with the Washington court's decision. The State does not deny that the fees at issue in the two cases were essentially identical. And the Massachusetts court did not rely on any finding of discrimination grounded in the record. To the contrary, in a portion of its opinion omitted by the State, the court expressly

noted that, "[a]lthough the discriminatory impact of the fees is not precisely quantifiable because the stipulated facts do not include statistics regarding the average number of miles traveled annually in Massachusetts by local trucks and by those registered in other jurisdictions, *it is intuitively obvious* that local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." 613 N.E. at 101 (emphasis added). The same thing is intuitively obvious here.[5]

Finally, the State acknowledges that *Government Suppliers Consolidating Servs., Inc.* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1993), "contains language supporting Petitioner's argument," although the State labels the Seventh Circuit's analysis dictum because the fees at issue in that case purportedly were "'part and parcel'" of a regulatory "backhaul ban" held unconstitutional on other grounds. Opp. 19 (quoting 975 F.2d at 1281). But that is a misreading of *Government Suppliers*. The Seventh Circuit found that the challenged fees had purposes in addition to furthering the backhaul ban and that it accordingly had to engage in an independent examination of the fees' validity under *Scheiner*. See *id.* at 281. The conflict in holdings therefore is inescapable.

D. The Issue Presented Here Is Important And Recurring

The State cannot deny that the issue presented here is an important and recurring one. *First*, it concedes (albeit reluctantly) that jurisdictions across the Nation continue to impose flat fees of various kinds on interstate carriers, and that many of these fees are used for regulatory and safety purposes identical to those found dispositive by the court below. While the State makes the conclusory claim that some of these fees may present unspecified "different concerns" from those raised by the Washington tax

---

[5] The State also asserts (Opp. 19) that the rule in Massachusetts is consistent with the holding below because, in *Aloha Freightways, Inc.* v. *Commissioner of Revenue*, 701 N.E.2d 961 (1998), the Massachusetts court upheld a tax that included a *de minimis* exception. The Washington regime, however, does not offer any trucker a complete tax exemption. In any event, the court below did not rely on the availability of floater cards and single trip permits in holding that the tax need not satisfy the apportionment requirement.

(Opp. 21), it is unable to articulate what those concerns might be, or how the constitutional principles governing those levies would differ in any respect from the ones at play here.

Second, Washington does not deny that many States have engaged in a continuing campaign to evade the requirements of *Scheiner*, and it cannot deny that the holding below will provide powerful support for those efforts. Again, Washington confines itself to the wholly conclusory (and plainly insupportable) assertion that the constitutional principles announced in this case will not be thought to have any bearing in suits involving other flat exactions. That assertion simply ignores the painful history of post-*Scheiner* litigation that is recounted in the petition and in ATA's *amicus* brief.

Third, Washington dismisses the importance of providing appropriate guidance to state and local governments about the rules governing their taxing authority, suggesting that States may protect themselves against retroactive liability by limiting refund rights through the use of short statutes of limitations. Opp. 21-22. But Washington cannot deny that the decision below will leave legislators in doubt about the rules governing state and local taxation, which surely is not a desirable state of affairs. And it is small comfort to know that taxing jurisdictions that are lulled by the Washington court's decision into enacting (or maintaining) unconstitutional levies may invoke procedural devices that will deny taxpayers an opportunity to vindicate their federal constitutional rights.

Fourth, the State finds no significance in the Washington courts' assertion of transparently insubstantial grounds with which to frustrate petitioner's rights under the Commerce Clause, contending that additional questions would have to be resolved on remand before petitioner and other members of the plaintiff class would obtain refunds. That the State intends to dream up new and palpably insupportable arguments against relief on remand, however, is no reason for this Court to deny review now[6] — an

---

[6] The State asserts that "unrebutted" evidence below established that a flat fee was the only practicable means of collecting a tax, and that the Washington tax therefore is permissible under *Scheiner*. Opp. 22. But that is preposterous. Not only may the function in question be funded by

outcome that would leave in place a holding that confuses the law and defies this Court's precedents.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES H. HANSON
LYNNE D. LIDKE
ROBERT L. BROWNING
Scopelitis, Garvin, Light & Hanson, P.C.
10 West Market St.
Suite 1500
Indianapolis, IN 46204
(317) 637-1777

ANDREW L. FREY*
CHARLES ROTHFELD
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

* *Counsel of Record*

MARCH 1999

---

one of the types of apportioned levies described above, but it may be paid for by increasing any of the several other apportioned assessments Washington already imposes on truckers, such as fuel taxes and registration fees. Indeed, the trial court in this case held the tax *invalid* under *Scheiner* (see Pet. 3), a conclusion that necessarily required a finding that apportionment of the tax *was* practicable.